Supreme Court, U.S.
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In The

Supreme Court of the United States

ARUNDEL ENGINEERING CORPORATION,

Petitioner,

v.

MARYLAND MASS TRANSIT ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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175 pp

QUESTIONS PRESENTED FOR REVIEW

This case involves administrative claims under a procurement contract with the State of Maryland that were dismissed as not timely filed. Petitioner contends that it was foreclosed from undertaking timely filing of claims through coercion and abuse of State agency personnel who administered the contract. Petitioner further contends that the State administrative contract appeals board colluded with the State agency in dismissing the claims.

1. Whether coercion and abuse by personnel of the Maryland Mass Transit Administration ("MTA"), an instrumentality of the State of Maryland, to foreclose timely filing of notice of claims under a State procurement contract, pursuant to §§15-217(b) and 15-219(a), *Md. Code, State Fin. & Proc. Art.* and COMAR 21.10.04.02A and B,[1] denied Petitioner due process of law under the 14th Amendment to the United States Constitution.

2. Whether such denial of due process constitutes waiver of the requisite 30 day notice of claim filing requirement and the State's sovereign immunity for failure of Petitioner to timely meet the notice of claim filing requirement.

3. Whether Petitioner was denied due process of law by collusion of the Maryland State Board of Contract Appeals ("Board") with MTA thereby foreclosing a fair and unbiased administrative appeals process pursuant to the 14th Amendment to the United States Constitution.

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[1] "COMAR" refers to Code of Maryland Regulations.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Arundel Engineering Corporation was the Petitioner before the Board, Plaintiff before the Circuit Court for Baltimore City ("CCBC"), Appellant before the Maryland Court of Special Appeals ("MCSA") and Petitioner for writ of certiorari before the Maryland Court of Appeals ("MCA").[2]

Respondent MTA, respectively, has been the Respondent, Defendant, Appellee, and Respondent in the proceedings below.

In accordance with Supreme Court Rule 29.6, Petitioner states that no parent or publicly held company owns more than 10% of the stock of Petitioner corporation, Arundel Engineering Corporation.

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[2] The decision of the MCSA constituted the final decision in the case in the Maryland judicial system when the MCA on November 9, 2001, denied Petitioner's petition for writ of certiorari to the MCSA.

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OPINIONS BELOW

1. The MCA issued an order on November 9, 2001, denying Petitioner's petition for writ of certiorari to the MCSA. (App. 106)

2. The MCSA issued an unreported decision on July 30, 2001, affirming the judgment of the CCBC. (App. 1)

3. The CCBC issued judgment on April 28, 1999 in an unreported decision affirming the decision, as supported by substantial evidence, of the Board rendered on December 17, 1998. (App. 31)

4. The Board issued a decision on December 17, 1998 (App. 44), incorporating earlier decisions of January 3, 1997 (App. 45, 95) and October 7, 1998 (App. 46, 71), that Petitioner's claims submitted under its procurement contract with MTA were untimely filed and thus barred by the doctrine of sovereign immunity.

All decisions and/or orders are reproduced in the Appendix.[3]

BASIS FOR JURISDICTION

1. The MCA denied Petitioner's petition for writ of certiorari to the MCSA by Order issued on November 9, 2001. This is a final decree rendered by the highest court in the State of Maryland in which a decision could be had.

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[3] A MCSA unreported related decision issued on May 7, 1998, on an interlocutory appeal in this case, referred to by the CCBC and MCSA in this appeal is also reproduced in the Appendix. (App. 83)

2. Petitioner files the subject petition for writ of certiorari to the MCSA pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution

United States Constitution, Amendment XIV, Section 1 provides, *inter alia* (full text set out at App. 107):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Code, State Finance & Procurement Art. (1995); Code of Maryland Regulations ("COMAR") (1995)

Applicable Maryland statutes and regulations (excerpts, full text set out in Appendix)

a. MSBCA Jurisdiction

The Board's statutory jurisdiction is set out in §15-211, *Md. Code, State Fin. & Proc. Art.*, "to hear and decide all appeals arising from the final action of a unit." The unit here is the MTA. The Board has jurisdiction under §15-211(a)(2) to decide appeals on a contract claim concerning "(i) breach; (ii) performance; (iii) modifications; or (iv) termination," excluding contract claims relating to a lease of real property. These categories pertain to the subject contract, excluding termination.

The Procurement Officer issues a final decision on behalf of MTA pursuant to §§15-217(a)(2), 15-218. Section 15-220 and COMAR 21.10.04.06A provide that an appeal to the Board from a Procurement Officer's decision must be filed within 30 days of receipt of notice of his decision. If the Procurement Officer does not issue a final decision, as requested by the Contractor, within 180 days of the request, that inaction, or non-response, is deemed a denial that may thereafter be appealed to the Board. COMAR 21.10.04.04E. *See, Maryland State Police, et al. v. Warwick Supply & Equipment Co., Inc.*, 330 Md. 474, 486, n.9, 624 A.2d 1238, 1244, n.9 (1992).

Section 15-215(b)(1) defines "contract claim" to mean a "claim that relates to a procurement contract." Petitioner's claims in this proceeding arise out of a procurement contract: MTA Contract No. 90-44-11. *Cf. Department of General Services v. Harmans, Ltd. Partnership*, 98 Md. App. 535, 546-547, 633 A.2d 939, 945 (1993).

COMAR 21.10.04.01B(1) further defines "claim" simply as "a complaint by a contractor or by a procurement agency relating to a contract subject to this title." A claim may be either for monetary compensation and/or additional time (i.e., an equitable adjustment), or a complaint regarding the agency's conduct of administration of the contract (i.e., breach of contract).

MTA Contract No. 90-44-11 incorporates by reference, as Exhibit B, Maryland Department of Transportation General Provisions (GP) for Construction Contracts (1989). GP-5.14 relates to money claims, and GP-5.15 relates to other disputes involving contract administration. *Cf. Genitor Stone Paving Products Co., Inc. v. State Highway Administration*, 94 Md. App. 594, 601, 618 A.2d 256, 259 (1993).

The regulations mandate a disputes provision (one of two alternates) in all contracts. GP-5.15 tracks COMAR 21.07.01.06B that provides, *inter alia*, as follows:

> (1) This contract is subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland and COMAR 21.10 (Administrative and Civil Remedies).
>
> (2) Except as otherwise may be provided by law, all disputes arising under or as a result of a breach of this contract that are not disposed of by mutual agreement shall be resolved in accordance with this clause.
>
> (3) As used herein, "claim" means a *written demand* or assertion by one of the parties seeking, as a *legal right*, the *payment of money*, adjustment or *interpretation of contract terms, or other relief*, arising under or relating to this contract. . . . [Emphasis added.]
>
> (4) A claim shall be made in writing and submitted to the procurement officer for decision in consultation with the Office of the Attorney General.

A claim under the disputes provision, GP-5.15, is thus particularly defined to be one for interpretation of contract terms and conditions. In contrast, GP-5.14 relates to claims for extension of time, equitable adjustment, extra compensation or damages for work performed under the contract, and tracks the provisions of COMAR 21.10.04.02.

Both types of claims come under the same filing procedures of COMAR 21.10.

b. Procedures for Filing Claims

Sections 15-217(b) and 15-219(a), *Md. Code, State Fin. & Proc. Art.* and COMAR 21.10.04.02A and B contain the provisions for timely filing of claims under a procurement construction contract. Sections 15-217(b) and 15-219 were amended by Md. Acts of 1996, Chapter 682, effective October 1, 1996. Provisions in effect prior to October 1, 1996 are applicable to this case.

Prior to the 1996 amendments, §15-219 did not contain a filing period for filing a written notice of a claim; it provided only for filing a claim within 30 days after written notice is submitted: "Within 30 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation. . . . "

Section 17-217(b), however, further provided that a "contract claim shall be submitted within the time required under the regulations adopted by the primary procurement unit responsible for the procurement." Under this authority, the Board of Public Works, pursuant to §12-101(b)(2) and (3), issued regulations incorporating within COMAR 21.10.04.02A a requirement of a 30 day period for filing a written notice of a claim: "a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier."

As applicable to this case, the Board of Public Works, under regulation COMAR 21.10.04.02B, also extended the statutory 30 day filing period for written explanation of a claim until final payment is made under the contract, after timely written notice is filed with the appropriate procurement officer: "[c]ontemporaneously with or

within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made." Such provision is also incorporated in the contract general provisions at GP-4.06G.

Upon enactment of the 1996 amendments, §15-217(b) provided that "[e]xcept as provided in §15-219 of this subtitle, a . . . contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement." The 1996 amendments thus codified the 30 day notice of claim filing requirement contained in COMAR 21.10.04.02A. Section 15-219 then provided that (a) " . . . a contractor shall file a written notice of a claim within 30 days after the basis for the claim is known or should have been known.", and (b) "Unless extended by the unit, within 30 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation" of the claim. COMAR 21.10.04.02B, extending the time for filing a documented claim until final payment is made under the contract, was thus left unchanged.[4]

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[4] Following subsequent amendments, Md. Acts of 1999, Chap. 684, eff. Oct. 1, 1999, §15-219(b) now provides that the contractor shall submit a written explanation of the claim "within 90 days after submitting a notice of a contract claim under a procurement contract for construction." COMAR 21.10.04.02B (2001) has comparably been amended to incorporate filing of the explanation of the claim "within 90 days of the filing a notice of a claim on a construction contract" to the appropriate procurement officer, "but no later than the date that final payment is made;" and further amended to

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

a. The Procurement Contract

MTA awarded construction contract MTA Contract No. 90-44-11 to Petitioner on March 9, 1994, to renovate the Metro Rogers Avenue Station in Baltimore, Maryland. The contract, *inter alia*, called for the topping slabs of the mezzanine and platform levels to be replaced, refurbishing of the hand-rails on both levels, and installation of a snow melting system in the platform topping slab. (App. 2)

Petitioner filed contract claims under COMAR 21.07.01.06B and GP-5.15 (raising issues of wrongful administration of the contract), and under COMAR 21.10.04.02A and GP-5.14 (asserting money damages), 17 total claims (including MSBCA No. 1957, an appeal of MTA's assessment of liquidated damages). The complaints before the Board and in the claims involved in this proceeding incorporate by reference allegations contained in MSBCA No. 1957: that MTA engaged in a fraudulent enterprise in its award and administration of the procurement contract to deny Petitioner just compensation. MTA's coercion and abuse to thwart Petitioner from filing timely notices of claims, in tandem with its refusal

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provide the procurement officer authority to extend the time for submitting explanation of a claim in excess of 90 days of submitting notice of the claim only "[o]n conditions the procurement officer considers satisfactory to the unit." (App. 129)

to put field change directives in writing, was a cardinal element of such enterprise.[5]

In light of MTA's assessment of liquidated damages, final payment has yet to be made under the contract. On August 2, 1996, MTA's counsel so advised Petitioner's counsel that "MTA is currently withholding from Arundel $52,263.53 in contract monies as liquidated damages." Therefore, explanations of all claims have been timely filed prior to final payment made under the contract in accordance with COMAR 21.10.04.02B.

Seven claims are involved in this proceeding (MSBCA Nos. 2043-2045 were withdrawn before the Maryland Court of Appeals):

MSBCA No. 1940 – two component claims: due process issue of MTA's refusal to put field change directives in writing;[6] and consequential damages claim, i.e.,

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[5] In the complaint in No. 1957 Petitioner alleges, *inter alia*, that:

> 39. MTA engaged in a fraudulent enterprise to deny [Petitioner] just compensation upon knowingly advertising and awarding the Contract containing Defective Specifications, and by incessantly making changes to Contract requirements through an abusive and coercive pattern of conduct. . . .

That MTA had knowledge of the defective specifications contained in the contract before it advertised and awarded the contract, and exercised coercion and abuse in its administration of the contract, have also been attested to in Petitioner's unopposed affidavits.

[6] Petitioner explicitly raised the due process issue in the No. 1940 complaint, alleging MTA's policy of refusing to put field change directives in writing as established by a pattern of practice. In briefing the issue and at the first hearing before the Board on December 19, 1996, Petitioner contended that policy to

"financial and time damages" of $573,986 (No. 1940 Second Amended Complaint). (MTA's field change directives were incessant; the due process claim was on-going throughout the project.)

MSBCA 2094 – refiling of due process claim of MTA's refusal to put field directives in writing, modeled on *Solon*, note 9, *infra*, for the Board to issue a declaratory ruling (refiling based on the Board's January 3, 1997 decision in which it dismissed the No. 1940 due process claim on grounds that the Procurement Officer had not decided the issue). For No. 2094, the Board (App. 61) and MCSA (App. 4) wrongfully stated that Petitioner sought to have the Board "direct that a State agency put certain matters in writing upon the agency's refusal to do so."

MSBCA No. 2039 – MTA rejected without foundation the initial portion of the mezzanine slab and joint sealers. Petitioner's job performance was impacted during the period June 15, 1994 through February 26, 1995. Petitioner claims $38,315.41 plus interest for labor, materials, equipment, subcontracts, payroll insurance and markup.

MSBCA No. 2040 – MTA directed continual changes to the concrete work (and caused repeated interferences with and delays to Petitioner's work on critical path activities). Petitioner's job performance was impacted during the period June 28, 1994 through October 19, 1994.

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be a violation of the 14th Amendment to the U.S. Constitution, in contrast to State statutes and regulations that do not require such writings. As discussed, *infra*, the Board improperly dismissed the No. 1940 claims. In its July 30, 2001 opinion, the MCSA specially referred to the due process issue as presented by Petitioner at the Board's December 19, 1996 hearing, albeit that the MCSA incorrectly responded to the issue. (App. 25)

Petitioner claims $39,405.49 plus interest for labor, materials, equipment, subcontracts, payroll insurance and markup.

MSBCA No. 2041 – MTA directed that Petitioner perform field surveys and numerous other changes to the platform work not called for in the contract. This was in consequence of latent Differing Site Conditions encountered by Petitioner, respecting the existing concrete substrate, after demolition of the existing topping slab. Problems also resulted from MTA's field directives, which were not reduced to writing, relating to installation of the topping slab fiberglass angle forms that did not conform to the contract drawings and specifications. Petitioner's job performance was impacted during the period June 28, 1994 through October 9, 1994. Petitioner claims $50,489.16 plus interest for labor, materials, equipment, subcontracts, payroll insurance and markup.

MSBCA No. 2042 – MTA directed a plethora of changes relating to fabrication and installation of the modified handrail sections on both the platform and mezzanine slabs; nine distinct handrail changes were particularly extensive including replacement of prior existing false welds. The changes were additions to the contract drawings and specifications (discussed in the Lynch Affidavit, *infra*). Petitioner's performance was impacted during the period March 16, 1994 through April 11, 1995. Petitioner claims $79,736.39 plus interest for direct costs for labor, materials, equipment, subcontracts, payroll insurance and markup.

MSBCA No. 2093 – MTA directed changes to Petitioner's work schedule beginning with its delay in issuing the Notice to Proceed (NTP) from the contract date of March 16, 1994 to April 13, 1994 (delay of 28 days). MTA

also created many other innumerable and cumulative delays by the changes imposed respecting claims Nos. 2039-2042 inclusive, discussed *supra*. (While cost claims for Nos. 2043-2045 have been withdrawn, cumulative delays occasioned thereby are included with other delays.) Petitioner claims $269,763.54 plus interest for extended and unabsorbed overhead costs.

b. Coercion and Abuse; Waiver of Sovereign Immunity

All claims were dismissed by the Board by its memorandum decision of December 17, 1998 as untimely filed. (App. 47, 60, 61) The Board falsely stated and Petitioner never "argue[d] that, regardless of whether it may be waived or not, the thirty day requirement is unlawful." (App. 57) As to the No. 1940 due process and consequential damages claims, the Board held them to have been untimely filed notwithstanding that the Procurement Officer denied these claims on the merits. (App. 102, 89)

i. Proceedings of the Maryland State Board of Contract Appeals

Petitioner raised the issue of MTA's coercion and abuse to foreclose timely filing of claims as a denial of due process of law and constituting waiver of the 30 day notice of claim filing requirement and sovereign immunity.[7] Petitioner filed four substantial affidavits, unopposed by MTA, attesting to MTA's coercion and abuse: *e.g.*, Lynch Affidavit as follows:

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[7] Even as Petitioner was foreclosed from noticing claims by MTA's coercion and abuse, yet the Board contends that Petitioner should have noticed a claim where the "State personnel are acting contrary to law." (App. 23, 55)

8. During numerous progress meetings and at other times, Mr. Brayman [MTA Manager of Field Construction] stated to Mr. Stevens and me that it was MTA's standard practice to refuse to entertain contractor claims while the work was in progress and that it was MTA's policy to wait until the job was completed to settle all claims at one time. Mr. Stevens and I protested that that policy was unfair and contrary to the provisions of the contract. The effect was to create cash flow problems for both Arundel and MetalFab [subcontractor] and damage to these companies, which had limited financial resources. Mr. Brayman responded, reiterated many times, that since the companies had entered into their contracts voluntarily they had assumed the burden of accepting MTA's method of operations, and that this policy applied to MTA's administration of all construction contracts and contractors.

23. Mr. Jacobs [MTA's Resident Engineer] dismissed my protests that he was ordering changes to the work and responded that as Arundel's subcontractor MetalFab had a duty to do "whatever was necessary" as he decided for performance of the work. He also admonished me not to submit a claim for such work prior to substantial completion of the Work.

24. I advised Mr. Jacobs that MetalFab was nearly bankrupt as a result of all the previous changes MTA had directed and not paid for, and that we could not continue to perform more changes without some financial relief. When I advised that MetalFab intended to submit written requests for more money through Arundel in a timely

manner, and would not wait until the job was over, Mr. Jacobs became extremely angry and threatened retaliation against MetalFab.

25. The retaliation was carried out in the weeks that followed by Mr. Jacobs rejecting several handrail changes that had been fabricated in accordance with his instructions. He directed that those sections be removed and re-fabricated, and dismissed my protests that we had complied with his instructions.

26. As a result of MTA's many changes to the handrail contract requirements, MetalFab performed many hours of extra labor without compensation, causing large losses for this small company. MetalFab's financial condition became progressively worse and the company was ultimately forced to go out of business.

In its decision of December 17, 1998, the Board disregarded the issue of coercion and abuse, and considered unopposed affidavit evidence as mere allegations, as follows:

> There is no evidence that the reprisals would involve physical violence or that Appellant would be physicially restrained from filing claims before the end of the job. [App. 52, n.11]

The Board continued:

> The acts encompassed by these allegations would be unauthorized, i.e., State employees are not authorized to engage in coercive acts designed to prevent the contractor from exercising its remedial rights under the General Procurement Law. [App. 52-53]

* * *

> [T]he specific allegations raised by Appellant herein of economic coercion and deprivation of due process, assuming *arguendo* the truth thereof, do not result in a constructive waiver of the requirement to file a timely notice or is a legal defense to the filing requirements. The conduct by MTA personnel as alleged in these appeals do not constitute a legal defense to the requirement to file notices of claims within the 30-day time frame set forth in COMAR 21.10.04.02A. [Emphasis original] [App. 54]
>
> * * *
>
> We would reach the same conclusion were we to view the matter from the perspective of waiver of sovereign immunity. The legislature has agreed by waiving the State's sovereign immunity in contract that a contractor may file claims against the State. However, certain conditions apply. These conditions include the timely filing of notice and documentation of a claim as defined by State Fin. & Proc. Code Ann. §§15-217(b) and 15-219(a) and COMAR 21.10.04. 02A and B. [App. 55]

When dismissing the claims as untimely filed, the Board gave no credence to COMAR 21.10.04.02B, that permits explanation of claims to be filed before final payment is made under the contract. (App. 62-65, 68)

ii. Proceedings of Circuit Court for Baltimore City

The CCBC reiterated the Board's decision of December 17, 1998 as to facts and law, and merely held that the decision of the Board was supported by substantial evidence. Without discussing the evidence, the CCBC held that the "documents only indicate that there had been a

history of problems," and that "the Board's factual conclusions are supported by substantial evidence and that the Board's decisions are correct." (App. 42)

iii. Proceedings of Maryland Court of Special Appeals

At the outset, upon review, the MCSA disregarded Arundel's questions presented for review and substituted its own questions for review.

Petitioner set out the questions for review:

1. Whether MTA's coercion and abuse to foreclose compliance with applicable claim filing requirements of the statutes and regulations denied Arundel due process of law.
2. Whether such denial of due process of law effects a waiver of the applicable claim filing requirements of the statutes and regulations.
3. Whether documents presented by Arundel comport with the applicable claim filing requirements of the statutes and regulations.
4. Whether the Board denied Arundel due process of law when wrongfully foreclosing Arundel from litigating its claims against MTA by rendering decisions containing false statements of fact and law.
5. Whether the Circuit Court correctly concluded that the Board's decision is supported by substantial evidence.

The MCSA substituted the following questions for review (App. 2):

I. Did the Board err in deciding that Arundel failed to file timely notices of claims under the State Finance and Procurement Article and applicable regulations?

II. Did the Board err in ruling that allegedly coercive statements by MTA personnel did not waive the applicable statutory and regulatory requirements?

III. Did the Board err in ruling there was no evidence to support Arundel's allegation that the Board denied it due process of law?

IV. Did the circuit court err in finding that the Board's decision was not supported by substantial evidence?

The MCSA thus did not directly respond to the questions of whether coercion and abuse constitutes denial of due process of law, and thus effects a waiver of the 30 day claim notice filing requirement that conditions waiver of the State's sovereign immunity. The MCSA refers to the coercion and abuse as merely alleged statements (II) when the statements are factual, under oath. Inasmuch as Petitioner's affidavits are unopposed, there is no issue of fact as to MTA's coercion and abuse to foreclose timely filing of notices of claims. Without addressing the issue of MTA's *conduct* of coercion and abuse as denying due process of law that would preclude application of the doctrine of sovereign immunity – in contrast to rendering erroneous advice – the MCSA stated that "We agree with the Board's legal conclusion that the agents of the MTA did not have the authority to waive the mandatory time requirements." (App. 24)

The MCSA further disregarded the issue of coercion and abuse to foreclose timely filing of claim notices as constituting waiver of such requirement; it responded with a *non sequitur* (App. 24): "Contrary to Arundel's argument, the Court of Appeals has held that requirements that condition a waiver of sovereign immunity on compliance with notice requirements are constitutional."

Petitioner raised the issue of constitutionality of *conduct* of MTA personnel in their administration of the procurement contract, not filing requirements of claim notices.

On the other hand, the MCSA observed with regard to claim No. 2042 that Petitioner had filed a timely notice of claim (App. 17):

> The language of the letters and the statement in the minutes of the May 4, 1994 progress meeting indicate the nature of the dispute and that Arundel was going to file detailed claims for this work, in accordance with COMAR 21.10.04.02B. Thus, it seems that Arundel did provide notice required by COMAR 21.10.04.02A.[8]

But even as the MCSA recognized that Petitioner in fact gave timely notice of the No. 2042 claim (to which the Lynch Affidavit, *supra*, is addressed), it yet – as to this claim and all other claims – did not give credence, in like manner of the Board, to the fact that MTA has not made a final payment under the contract; and, therefore, that all

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[8] Respecting claim No. 2041, the MCSA similarly referred (App. 15) to the minutes of the September 9, 1994 progress meeting in which Petitioner expressed an intention to file a claim: "Unfortunately our budget for this project can no longer withstand these cost[s] and we are developing our cost estimate and breakdown . . . and will forward these to you. . . . " Yet, the MCSA viewed that statement as merely reflecting "the existence of a dispute and does not provide notice that Arundel will file a claim for these costs."

The MCSA also recognized that Petitioner filed more than 35 references regarding cumulative delays referenced in No. 2093 that are asserted as notice of that claim, while disregarding COMAR 21.10.04.02B providing that claims may be filed before final payment is made under the contract. (App. 20)

explanations of the claims have been timely filed in accordance with COMAR 21.10.04.02B – although filed two or more years after the work on the project was completed. (App. 12-18, 23)

And, too, the MCSA misreads COMAR 21.10.04.02B when it states that "At all times relevant to this appeal, the requirement to file a claim no later than 30 days after filing notice was absolute." (App. 12, n.4) The extension allowing filing of a claim prior to final payment made under the contract was promulgated pursuant to authority under the State Fin. & Proc. Art. §15-217(b) authorizing the Board of Public Works to issue regulations, rather than by direct legislation as the MCSA so circumscribes.

Lastly, Petitioner had not raised a question of sufficiency of evidence of a Board ruling that it, itself, had not denied Arundel due process of law (III). The evidence, if there is such denial, is intrinsically in the Board's hearing transcripts and decisions, rather than predicated on extrinsic evidence. It is for the courts, moreover, to determine whether the Board denied Petitioner due process of law, rather than that the Board would rule on such issue.

c. Collusion Between the Board and MTA

i. Board Decision of January 3, 1997

The Board dismissed the No. 1940 due process claim of MTA's refusal to put its field directives in writing on grounds that the Procurement Officer had not decided the claim even as the claim was explicitly denied on the merits. The Board, further, wrongfully applied COMAR 21.10.04.04E. (*See* note 10, *infra*.)

ii. Board Decision of October 7, 1998

Arundel had filed claims MSBCA Nos. 1988, 1990, 1992 under GP-5.15 – relating to MTA's wrongful administration of the contract: economic coercion, malicious interference, tortious conduct, and fraudulent enterprise and denial of due process. These claims were dismissed by the Board on October 7, 1998 as not timely filed, *i.e.*, without jurisdiction. (App. 77-78)

1) As to the No. 1990 claim, MTA moved to dismiss only on grounds that the claim had been withdrawn (falsely asserted). By dismissing the claim as untimely filed, the Board covered up malfeasance of MTA's attorney who filed an altered document as part of MTA's motion with the Board.

2) While it was without jurisdiction, the Board yet sought to effect a decision on the merits by holding that Arundel's claims of agency misconduct were "dismissed with prejudice" (App. 77, 78, 80) – so to obviate any further challenge to MTA's maladministration of the contract. But *see University of Md. v. MFE Incorp./NCP Architects, Inc.*, 345 Md. 86, 103, 691 A.2d 676, 684 (1997), holding that finality language was not included in the Board's authorizing statute.

3) The Board coached MTA's counsel at the September 25, 1998 hearing as to MTA's position respecting evidentiary matters in No. 1957, an appeal of assessment of liquidated damages in which Petitioner alleges that MTA engaged in a fraudulent enterprise. And, too, that claim was not then before the Board.

iii. Board Decision of December 17, 1998

1) Prior to its December 17, 1998 decision, the Board invited MTA to file motions to dismiss for untimely filing of the claims in this proceeding, and then disposed of the claims as being untimely filed while obfuscating the requirements of paragraphs A with B of COMAR 21.10.04.02.

2) The Board had held that the No. 1940 due process and consequential damages claims were not timely filed, even as the claims had been denied by Procurement Officer on the merits; no issue of timeliness was raised. As observed by the MCSA, in Nos. 2041 and 2042, written minutes of progress meetings reveal Petitioner's timely notice to file claims, and more than 35 references in No. 2093.

3) Notwithstanding that an earlier Board case held that the Board had authority to issue declaratory rulings,[9] raised during the hearing on December 19, 1996 (App. 26), the Board also held that it did not have jurisdiction over the No. 1940 due process claim because it had no authority to direct MTA to put its field directives in writing. (App. 60) As to No. 2094 (refiling of No. 1940 due process claim) in which Petitioner sought a declaratory ruling, the Board, further, falsely stated that No. 2094 asked the Board to direct MTA to put its field directives in writing. (App. 61)

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[9] "[T]he Board is not empowered to compel a State agency to act or refrain from acting in a particular manner. However, bid protests still may be resolved effectively by the Board through the issuance of declaratory rulings concerning the applicability of the procurement law and regulations." *Solon Automated Services, Inc.*, No. 1046, 1 MSBCA ¶10 (Jan. 20, 1982).

4) And when denying both the No. 1940 due process and consequential damages claims on December 17, 1998 as untimely filed, the Board did so almost two years after its January 3, 1997 denial of the due process claim on grounds that the Procurement Officer had not ruled on the issue, and retained jurisdiction over the consequential damages claim. The Board thus manipulated the administrative and judicial process to foreclose judicial review of the January 3, 1997 decision.[10]

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[10] In its January 3, 1997 decision the Board dismissed the No. 1940 due process issue (a separate claim under GP-5.15) on the ground that the Procurement Officer had not ruled on the due process issue, when in fact he rendered a decision and denied the issue on the merits. The Board based its ruling on COMAR 21.10.04.04E (App. 103, 99) (pertaining to lack of a Procurement Officer's decision on a claim, rather than failure of the Procurement Officer to address an issue when rendering a decision). Petitioner raised the issue of collusion in an interlocutory appeal of the No. 1940 due process issue (and No. 1929, not involved in this appeal).

The MCSA on May 7, 1998 held the Board's January 3, 1997 decision to be non-final inasmuch as the Board retained jurisdiction over the consequential damages claim. (App. 93) As to Petitioner's contention of collusion the court opined (App. 93-94):

> Without the slightest factual basis, appellant made the scandalous suggestion in its brief, and requested that we find that "MTA colluded with MSBCA to deny Arundel its rights of due process of law and thus engaged in bad faith and was lacking in substantial justification in the proceedings before MSBCA." The unsupported and scurrilous attack by appellant's counsel on the integrity of two independent agencies of this State was totally irresponsible and unprofessional.

5. The Board utterly disregarded COMAR 21.10.04.02B that permits explanation of claims to be filed any time prior to final payment made under the contract, albeit some years after completion of the work.

6. At note 12 of its December 17, 1998 decision (App. 52-53), the Board indicates that it would also negate Petitioner's allegations in the No. 1957 complaint by dismissing MTA's claim for liquidated damages as well – again, also notwithstanding that No. 1957 was not then before the Board. Petitioner would be permitted to prove allegations of MTA's misconduct as a defense to the assessment of liquidated damages "should [MTA] make a prima facie showing that the assessment of liquidated damages involved in MSBCA 1957 was appropriate."

iv. Response by Maryland Judiciary

As it did in the interlocutory appeal, Petitioner again raised the issue before the CCBC of collusion between the Board and MTA when seeking judicial review of the Board's December 17, 1998 decision, to which the court responded (App. 42):

> Arundel has requested this Court to find that the Board colluded with MTA to deny Arundel its rights and that the proceedings conducted by MTA and the Board were in bad faith and lacking in substantial justification. The Court has a great deal of difficulty when a tribunal is alleged to have participated in corrupt or collusive conduct. When someone makes a statement of that magnitude it has to be taken seriously. The Court finds nothing in the record to support Arundel's allegations.

The MCSA interlocutory appeal statement respecting collusion was repeated by the CCBC (App. 43), and again

by the MCSA in its opinion of July 30, 2001 (App. 29), from which the instant petition follows:

> We echo these statements and remind Arundel that the numerous hearings, exhaustive pleadings, three Board decisions, two circuit court decisions, two appeals to this court, and two petitions for certiorari [a third petition was thereafter filed and denied] all demonstrate the ample due process the system has afforded it.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The core of this case is corruption of MTA in awarding a contract with defective specifications by which the construction intended could not have been accomplished. MTA then imposed verbal contract changes on Petitioner, refusing to put them in writing, and exercised coercion and abuse to foreclose timely notices of claims, on which basis to deny just compensation. When colluding with MTA, the Board sought to coverup MTA's maladministration of the contract by issuing decisions containing false statements of facts and blatantly false rulings of law – and covering up malfeasance of MTA's attorney and manipulating the administrative and judicial process. Petitioner has not been afforded "ample due process" by the Maryland judicial system, as the MCSA opined.

A. Coercion and Abuse; Waiver of Sovereign Immunity

The MCSA ratified the Board's finding that "even assuming the truth of Arundel's allegations of 'coercion

and abuse'[11] by MTA employees, the State is not bound by the unauthorized acts of its agents." (App. 22). Such holding is clearly contrary to this Court's ruling in *Zinermon v. Burch*, 494 U.S. 113 (1990).

Florida failed to follow statutory mental health "voluntary" placement procedures that were not challenged as inadequate to ensure due process. The Court held that the State "cannot characterize [ ] conduct of [State employees] as 'unauthorized' " since *"the State delegated to them the power and authority to effect the very deprivation complained of here. . . .* The deprivation here is 'unauthorized' only in the sense that it was not an act sanctioned by state law, but instead, was a 'deprivation of constitutional rights . . . by an official's abuse of his position.' " (Emphasis added.) *Id.* at 138.

Similarly, MTA's Manager of Field Construction and Resident Engineer had authority to direct what work would be done on the job, however unreasonable the directive – thus to engage in abuse of authority when exercising coercion to foreclose Petitioner from timely filing notices of claims, and to retaliate against Petitioner if indeed notice of claims were timely filed. Noncompliance with MTA's change directives, would have been in violation of regulation COMAR 21.07.02.02(2), and GP-4.06B, demanding that "Any other written order *or an oral order*, including direction, instruction, interpretation or determination, from the procurement officer that causes such change, shall be treated as a change

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[11] Coercion does not require physical restraint to foreclose timely filing of notices of claims, as also viewed by the Board. The MCA has held that threats of economic injury are sufficient. *Bayshore Industries, Inc. v. Ziats*, 232 Md. 167, 174, 192 A.2d 487, 491 (1963).

order. . . . " (Emphasis added.)[12] The obligation of the contractor is "to prosecute the work continuously and diligently." COMAR 21.07.01.13. Failure of Petitioner to follow MTA's directives would have permitted the State representatives to "terminate [Petitioner's] right to proceed with the work." COMAR 21.07.02.07(1).

As in *Zinermon*, Petitioner does not take issue with the State's statutory and regulatory provisions for filing claims as a condition for waiver of the State's sovereign immunity, but does challenge as a deprivation of due process MTA's *conduct* of coercion and abuse to foreclose Petitioner from exercising its rights under such provisions.

The MCSA, further, ratified the Board's conclusion "that timely filing of a notice of a claim is a condition precedent to the State's waiver of sovereign immunity against state procurement contract claims. . . . MTA officials lacked authority to waive the conditions for filing claims against the State." (App. 22) While in ordinary course agency personnel may not waive statutory requirements or the State's sovereign immunity by erroneous advice, compare *Schweiker v. Hansen*, 450 U.S. 785 (1981), on the other hand the State's sovereign immunity does not take precedence for the State to deprive a person

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[12] Responding to Petitioner's complaints of MTA's reversals of verbal field change directives by other verbal directives following work completion of the initial directives, on January 4, 1996, the Procurement Officer wrote that the Manager of Field Construction "retained ultimate authority for administering field activities, including the authority to issue directives and render decisions, and including the authority to review, approve, reject, amend, or otherwise handle any action/decision of the [Resident Engineer]."

of due process of law under the 14th Amendment in the exercise of its rights under State law. Sovereign immunity, like a "*statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." (Emphasis original) *Davis v. Passman*, 442 U.S. 228, 240 (1979).

The MCSA's decision in the instant case contradicts *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), instituted under 42 U.S.C. §1983, wherein the Court held that where there is a denial of a person's rights under the 14th Amendment, a municipality would not be shielded by governmental immunity.

> That common-law doctrine [of governmental immunity] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; *its dictates are absolute and imperative.*
>
> * * *
>
> As was stated in *Sterling v. Constantin, 287 U.S. 378, 398 (1932)* [italics original]: "When there is a substantial showing that the *exertion of state power has overridden private rights secured by that Constitution,* the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." [Emphasis added.]

Id. at 649-650.

Petitioner has been denied its rights to due process of law under the 14th Amendment. Petitioner was not permitted by MTA personnel, by coercion and abuse, to exercise its rights under State law to timely file notice of its claims. By denial of such rights the State of Maryland's

sovereign immunity perforce does not shield it from liability.

B. Collusion Between the Board and MTA

This case is akin to *United States v. Carter*, 217 U.S. 286 (1910). Petitioner contractor has been defrauded by collusion between a State agency and the State's administrative contract appeals board, comparable to the federal government being defrauded by collusion between agency personnel and the contractor as in *Carter*.

In *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), the Court observed: "As this Court repeatedly has recognized, *due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities*. E.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242-243, and n.2 (1980)." (Emphasis added.) Yet, at every turn, the Board wrongfully sought to insulate MTA from liability for its maladministration of the contract, by setting out false statements of fact and law in its decisions to deny Petitioner rights to litigate its claims.

In addition to wrongfully inviting MTA to file motions to dismiss for untimeliness, and dismissing Petitioner's claims on such grounds when giving short shrift to MTA's coercion and abuse to foreclose filing of timely notices of claims, the Board twice dismissed, on different false grounds, Petitioner's No. 1940 due process claim of MTA's refusal to put its field directives in writing (refiled in No. 2094). First, by its January 3, 1997 decision on the ground that the Procurement Officer had not considered that issue when he in fact had denied the issue on the merits; and again in its December 17, 1998 decision, on the spurious ground that the Board had no authority to

direct MTA to put its directives in writing when it has authority to issue declaratory rulings.

The MCSA recognized, too, that timely notices of claims had been filed for claim Nos. 2042 and 2093, and, inferentially recognized, timely filed for No. 2041. The Board also utterly disregarded the law, COMAR 21.10.04.02B and GP-4.06G, providing that explanations of claims may be filed any time before final payment is made under the contract – thus, irrespective of some years after the work is completed.

While in its January 3, 1997 decision the Board took jurisdiction over the No. 1940 consequential damages claim to render the No. 1940 due process claim dismissal as non-final (so held by the MCSA on an interlocutory appeal), almost two years later, December 17, 1998, the Board then dismissed the consequential damages claim as untimely filed. By withholding its ultimate ruling on timeliness, the Board manipulated the administrative and judicial process, thereby imposing on the Maryland judiciary, and extending delay and imposing greater costs on Petitioner.

When dismissing Petitioner's claims in Nos. 1988, 1990 and 1992 on jurisdictional grounds as untimely filed in its October 7, 1998 decision, the Board was complicit in covering up malfeasance of MTA's attorney who submitted an altered document with the motion. As to No. 1990, MTA had not moved for dismissal on grounds of timeliness, but on grounds that the claim had been withdrawn. The Board also flouted the MCA – which has held that the Board's authorizing statute does not provide Board decisions finality – when it dismissed claims Nos. 1988, 1990 and 1992 on the merits, "with prejudice," that contained

allegations of MTA's "economic coercion, fraudulent enterprise, malicious interference, and tortious conduct."

And as to its future rulings, at note 12 of its December 17, 1998 decision, the Board signaled MTA that it would also negate Petitioner's allegations in No. 1957 that MTA engaged in a fraudulent enterprise in its award and administration of the contract, while exercising coercion and abuse, to deny Petitioner just compensation.

The Board so egregiously denied Petitioner due process of law under the 14th Amendment to the United States Constitution (and concomitantly §24 of the Declaration of Rights of the Maryland Constitution and Maryland Administrative Procedure Act, §10-201, *Md. Code, State Govt. Art.*) when engaged in the administrative proceedings in this case.

CONCLUSION

Petitioner respectfully submits:

a) that Petitioner's claims are not barred by the State's sovereign immunity inasmuch as MTA denied Petitioner due process of law under the 14th Amendment to the U.S. Constitution by its conduct of coercion and abuse to foreclose Petitioner from exercising its rights to meet the requisite 30 day claim notice filing requirement; and

b) the Board, by its hearings and false statements of facts and rulings of law in its administrative decisions, further deprived Petitioner of due process of law under the 14th Amendment to the U.S. Constitution of rights to litigate its claims before the Board.

Petitioner had not been afforded "ample due process" by the Maryland judicial system, as the Maryland Court of Special Appeals opined.

Petitioner respectfully requests the Court to grant a writ of certiorari to the Maryland Court of Special Appeals, and reverse the judgment below.

Respectfully submitted,

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 554

SEPTEMBER TERM, 1999

ARUNDEL ENGINEERING CORPORATION

v.

MARYLAND MASS TRANSIT ADMINISTRATION

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*Wenner,
Eyler, Deborah S.
Adkins,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 30, 2001

On December 17, 1998, the Maryland State Board of Contract Appeals ("the Board" or "MSBCA") dismissed ten claims brought by Arundel Engineering Corporation ("Arundel") against the Maryland Mass Transit Administration ("MTA") for failure to file timely written notices of the claims. On April 28, 1999, the Circuit Court for Baltimore City affirmed the Board's decision. On appeal, Arundel poses the following questions for review, which we have reworded and condensed:

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* Wenner, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

I. Did the Board err in deciding that Arundel failed to file timely notices of claims under the State Finance and Procurement Article and applicable regulations?

II. Did the Board err in ruling that allegedly coercive statements by MTA personnel did not waive the applicable statutory and regulatory filing requirements?

III. Did the Board err in ruling there was no evidence to support Arundel's allegation that the Board denied it due process of law?

IV. Did the circuit court err in finding that the Board's decision was supported by substantial evidence?

For the reasons below, we answer these questions in the negative. Accordingly, we shall affirm the judgment.

FACTS

On March 9, 1994, the MTA awarded contract number 90-44-11, for renovation of the Rogers Avenue Metro Station in Baltimore City, to Arundel. The metro station is elevated on two levels, with passenger access to trains at the upper platform level. The scope of the work required Arundel to demolish and replace the mezzanine and platform topping slabs, install a snow melting system in the platform slab, and refurbish the metal handrails on both levels.

The work for the Rogers Avenue Metro station was scheduled to be completed by November 20, 1994. It was not completed until April 30, 1995, however. On December 1, 1994, the MTA notified Arundel that it was subject

to a liquidated damages assessment for failing to complete the project by the November 20, 1994 completion date. Sometime shortly thereafter, Arundel retained Stephen Schwartz, a physical engineer, as a consultant to assist it in resolving the many problems and disputes that had arisen over the project. Between December 22, 1994, and April 30, 1995, Mr. Schwartz wrote over 50 letters to Edmund Smith, the project's resident engineer. In those letters, Mr. Schwartz raised issues about the project and discussed the ongoing problems and disputes that had arisen. The letters are lengthy and highly detailed. Eleven of the letters were written between December 22, 1994, and January 11, 1995. On January 11, 1995, in acknowledging receipt of the eleven letters, Mr. Smith stated:

> [T]he stream of correspondence gives no sign of abating. Please be advised that the MTA has neither the time, the resources, nor the inclination to address each of the positions taken, and allegations made by Mr. Schwartz in his letters. The MTA will reserve any response until such time as [Arundel] submits a timely claim for an equitable adjustment in conformance with . . . Contract General Provision 5-14.[1]

From October 1995 to September 1998, Arundel filed a total of seventeen claims against the MTA that related to contract number 90-44-11. Ten of those claims are involved in this appeal. They are numbers 1940, 2039 through 2045, 2093, and 2094. The claims concern a number of problems that Arundel alleges arose during

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[1] Contract General Provision 5-14 contains language nearly identical to SFP § 15-217(a) and COMAR 21.10.04.02 (A through C).

the course of the contract and caused it to incur costs beyond those originally anticipated. In each claim, Arundel requests that the MTA pay it "financial and time damages."

Specifically, in Claim No. 1940, Arundel requests damages for "direct operational costs and economic injury totaling $573,986" for the MTA's failure to "put verbal directives in writing." In Claim No. 2094, Arundel requests essentially the same relief: that the Board "direct that a State agency put certain matters in writing upon the agency's refusal to do so." Claim No. 2093, seeks damages of $269,763.54, for delay costs. In Claims Nos. 2039 through 2045, Arundel requests payment of $221,870.05 in direct costs relating to changes directed by the MTA while work on the project was in progress.

The seven claims by Arundel against the MTA that are not involved in this appeal are Claim No. 1929, part of Claim No. 1940, and Claims Nos. 1988 through 1992.

In Claim No. 1929, Arundel sought payment of certain fees incurred by its engineering consultant, Mr. Schwartz. In Claim No. 1940, Arundel sought damages for "due process" violations, on the ground that the MTA would not reduce its verbal field directives to writing, and also money damages for "wrongful administration" of the contract.

The MTA moved to dismiss Claims Nos. 1929 and 1940. The Board held a hearing on that motion on December 19, 1996. On January 3, 1997, the Board partially

dismissed these claims.[2] Arundel then filed a petition. for judicial review in the Circuit Court for Baltimore City. That court dismissed the petition on the ground that the rulings of the Board were not final and therefore not reviewable. An appeal was taken to this Court, and we affirmed. *Arundel Engineering Corporation v. MTA*, No. 98-1408 (May 7, 1998), *cert. denied*, No. 98-205 (Md. August 24, 1998).

In Claims Nos. 1988 through 1992, also not involved in this appeal, Arundel alleged that the MTA had engaged in "economic coercion," "fraudulent enterprise," "malicious interference," and "tortious conduct." The MTA also moved to dismiss those claims. The Board held a hearing on that motion on September 25, 1998, and dismissed the claims on October 7, 1998. The Board found that Arundel had not filed written notices of the claims within the applicable time period for doing so. Arundel did not seek judicial review of those dismissals.

In the ten claims involved in this appeal, the MTA filed motions to dismiss with the Board on the grounds that Arundel had failed to file timely notices of the claims and had failed to submit timely documentation of the claims. In addition, the MTA asserted that Arundel had

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[2] The Board dismissed the "due process" part of Claim No. 1940 but retained jurisdiction over "financial and time damages." The Board denied Arundel's request for engineering fees in Claim No. 1929, and found that the Procurement Officer had not rendered a final decision concerning the MTA's refusal to put verbal denials of claims for engineering fees in writing. Because the procurement officer had 180 days to respond to the claim, the Board concluded this claim was filed prematurely. COMAR 21.10.04.04E

not filed adequate documentation to support its claims. Arundel countered by arguing that it had filed the notices and the claims in a timely manner, and, in the alternative, that it had been prevented from filing timely notices and claims by the "coercive and improper behavior" of MTA employees.

On September 25, 1998, the Board held a hearing on the MTA's motion to dismiss. On December 17, 1998, it issued a memorandum opinion and order dismissing the claims on the ground that they were not timely filed and that, even if the MTA employees had conducted themselves as alleged by Arundel, their behavior did not effect a waiver of the statutory filing requirements.

Arundel filed a petition for judicial review in the Circuit Court for Baltimore City. That court heard argument of counsel on April 21, 1999. On April 28, 1999, it issued a memorandum opinion and order affirming the Board's decision. Arundel then noted a timely appeal to this Court.

Additional facts will be recited as necessary to our discussion of the issues.

STANDARD OF REVIEW

In reviewing an appeal from the circuit court's review of an agency's final decision we "look not *at* the decision of the circuit court but rather *through* the filter of the circuit court directly to the agency itself, in precisely the same way that the circuit court looked at it." *Town of Sykesville v. West Shore Communications, Inc.*, 110 Md. App. 300, 313-14 (1996) (emphasis in original). In this case,

therefore, we review the Board's decision by applying the same standard of review applied by the circuit court. *See Public Serv. Comm'n v. Baltimore Gas & Elec. Co.*, 273 Md. 357, 362 (1974); *Ahalt v. Montgomery County*, 113 Md. App. 14, 20 (1996). Our role "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Erb v. Department of the Env't*, 110 Md. App. 246, 255-56 (1996); *see also Citrano v. North*, 123 Md. App. 234, 238 (1998); *Umerley v. People's Counsel for Baltimore County*, 108 Md. App. 497 (1996). Thus, a court will reverse the board's decision "only where there are no grounds for reasonable debate or where the action . . . has been found to be arbitrary and capricious." *Citrano*, 123 Md. App. at 238 (citing *Hardesty v. Board of Zoning Appeals*, 211 Md. 172 (1956)).

In performing this function, we consider the entire record and look to see if there is evidence to support each fact found. *See Red Roof Inns, Inc. v. People's Counsel for Baltimore County*, 96 Md. App. 219, 224 (1993). We do not make factual findings, *Board of Comm'rs v. Holbrook*, 314 Md. 210, 218 (1988), and we do not supply facts that were not relied upon by the Board in reaching its decision. *See United Steelworkers of America, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984). Instead, we will uphold the Board's decision only if it "is sustainable on the [Board's] findings and for the reasons stated by the [Board]." *Id.*

To the extent that the issues turn on the correctness of the Board's factual findings, "such findings must be

reviewed under the substantial evidence test." *Department of Educ. v. Shoop*, 119 Md. App. 181, 196 *cert. denied*, 349 Md. 495 (1998). Substantial evidence means more than a mere scintilla of evidence, such that reasonable persons could come to more than one conclusion. *Id.* Thus, an agency's decision is supported by substantial evidence if a reasoning mind could have reached the agency's factual conclusions. *Id.* In applying this test, we will not substitute our judgment for that of the Board if the decision was "fairly debatable" in light of the evidence presented to it. *See Holland v. Woodhaven Bldg. Dev., Inc.*, 113 Md. App. 274, 280 (1996). To the extent that the issues turn on questions of law, the Board's decision is not entitled to deference on appeal and we may substitute our judgment for that of the Board. *See Columbia Rd. Citizen's Ass'n v. Montgomery County*, 98 Md. App. 695, 698 (1994).

DISCUSSION

I.

Title 15 of the State Finance and Procurement Article of the Maryland Code governs the administrative procedure for resolving disputes arising out of state procurement contracts. Maryland Code (1995 Repl. Vol.), § 15-217 (b) of the State Finance and Procurement Article ("SFP"), provides that a contractor must submit his contract claim "within the time required under regulations adopted by the primary procurement unit responsible for the procurement." Pursuant to this directive, COMAR 21.10.04.02 provided, during the relevant time period:

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a *written notice* of a claim relating to a contract *with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known,* whichever is earlier.

B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. The claim shall be in writing and shall contain:

(1) An explanation of the claim, including reference to all contract provisions upon which it is based;

(2) The amount of the claim;

(3) The facts upon which the claim is based;

(4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and

(5) A certification . . . [that] the claim is made in good faith. . . .

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 *shall be dismissed.*

(Emphasis supplied.) *See also* SFP § 15.219 (a) (providing that the contractor must supply a written explanation of the claim, including, *inter alia,* the amount of the claim and the facts underlying the claim, within 30 days after submitting the notice of the claim). The general provisions for construction contracts, which governed the contract between MTA and Arundel, echo these regulations.

See Maryland Dep't of Transp., General Provisions for Construction Contracts 1989 § 5.14 (1989).

Arundel did not dispute before the Board, and does not argue on appeal, that the notices of claims that it filed with the appropriate procurement officer were filed more than thirty days after the basis for each claim was known. In Claims Nos. 1940 and 2094, both of which sought relief for failure of the MTA to "put verbal directions in writing," Arundel's notices of claims were filed on October 13, 1995, five months after the completion of all work. Notices of seven of the other eight claims, all of which sought compensation for costs, were filed with the appropriate procurement officer on June 3, 1997. The costs to which those claims related were known to Arundel more than 2½ years before June 3, 1997.[3] The one remaining notice of claim, in Claim No. 2093, was filed with the appropriate procurement officer on March 10, 1998 (and was amended on April 3, 1998), and was based on events

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[3] The time frames involved are as follows:

Claim	*Time in Which Costs were Incurred*	*Notice of Claim and Claim filed*
No. 2039	6/14/94 – 2/26/95	6/3/97
No. 2040	5/94 - 10/94	6/3/97
No. 2041	7/10/94 - 11/94	6/3/97
No. 2042	4/11/95 - 4/15/95	6/3/97
No. 2043	3/94 - 11/7/94	6/3/97
No. 2044	4/28/94 - 12/5/94	6/3/97
No. 2045	no dates specified; but all work was completed by 4/95.	6/3/97

ending in April 1995, at the conclusion of the contract, almost three years earlier.

Arundel argues that, notwithstanding the above, the Board erred in concluding that it did not file timely notices of the claims because letters that Mr. Schwartz sent to Mr. Smith from December 1994 through April 1995 and the minutes of progress meetings held throughout the duration of the project constituted timely notices of the claims in accordance with SFP § 15-217 and COMAR 21.10.04.02.

The Board determined that the various minutes and letters that Arundel asserted constituted notices of its claims were not notices of claims, within the meaning of SFP § 15-217 and COMAR 21.10.04.02. We agree.

1. *Claims Nos. 1940 and 2094.* Arundel argued before the Board, and maintains on appeal that minutes of a May 4, 1994 progress meeting between MTA officials and Arundel representatives, and letters by Mr. Schwartz, dated December 27, 1994, and January 10, 1995, were among the notices of these claims that it was "continually submitt[ing]." The minutes and letters contain references to Arundel's displeasure with the fact that the MTA was making verbal change orders without putting them in writing. The mere reference in a letter to a disputed issue or a point of disagreement is not a "notice of claim," however. In addition, these writings were not filed with a procurement officer, as required by COMAR 21.10.04.02(A).

We note that, even if the correspondence from Mr. Schwartz and the minutes of the progress meetings could constitute notice of Arundel's claims, Arundel should

have filed the claim itself within thirty days of the notice, pursuant to COMAR 21.10.04.02B.[4]

The Board found that Arundel did not file claims numbers 1940 and 2094 until over five months after the completion of all work on the project. Therefore, in accordance with COMAR 21.10.04.02(C), the claims were properly dismissed.

2. *Claim No. 2039.* This claim concerns costs related to a reduction in the size of the mezzanine expansion joints and rejection of the initial pour of the mezzanine slab. According to Arundel's complaint, appealing the decision of the procurement officer to the MSBCA, the acts giving rise to this claim occurred on June 14 and June 17, 1994.[5] Arundel claims that the last day on which it incurred expenses relating to this claim was February 26, 1995.

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[4] A contractor must file its claim before final payment if payment is made less than 30 days after the contractor filed notice of its intent to file a claim. COMAR 21.10.04.02B. At all times relevant to this appeal, the requirement to file a claim no later than 30 days after filing notice was absolute. The legislature did not provide for any exceptions. Effective October 1, 1996, the legislature allowed the procurement officer the discretion to extend the period for filing the claim itself, but only if the initial notice of claim was timely filed within 30 days of the date the contractor knew or should have known of the basis for its claim. St. Fin. & Proc. § 15-219 (b) (1998 supp.). In 1999, the legislature extended the time for filing a claim to 90 days. St. Fin. & Proc. § 15-219 (b) (1999 Supp.).

[5] Arundel asserted that the MTA ordered the reduction in the size of the mezzanine expansion joints on June 14, 1994, and that it rejected the initial pour of the mezzanine slab on June 17, 1994.

Arundel argued before the Board, and repeats on appeal, that a December 30, 1994 letter from Mr. Schwartz to Mr. Smith respecting "Progress Meeting No. 33" constitutes notice of the claim. That letter states:

> [Arundel] wishes to go on record as stating that this dispute, which has been ongoing for a period of several months, has already caused the Contractor to be significantly damaged, in terms of both costs and schedule. [Arundel] advises that it intends to file a claim for all damages associated with this dispute. This will be done as soon as all relevant facts have been compiled and the complete damages have been calculated by its staff and the writer, and fully coordinated with all affected [sic] parties.

Assuming, *arguendo*, that this letter constitutes notice of Arundel's intent to file a claim and that it was timely filed, Arundel did not file the claim itself until June 3, 1997, more than two years after all work on the contract was completed.[6] The Board did not err in dismissing the claim, in accordance with COMAR 21.10.04.02(C), for failure to adhere to the time requirements for the filing of claims.

3. *Claim No. 2040.* This claim arises from costs incurred for concrete work between May 4, 1994, and

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[6] Although the Board indicates in the beginning of its opinion that it is addressing only the "allegations that [Arundel] failed to file timely *notices* of its claims" (emphasis added), and not whether Arundel filed timely *claims*, it is clear from the contents of the Board's opinion that it did in fact consider whether the claims themselves were filed timely. For instance, the Board wrote: "Therefore, Claim No. 1 was not timely filed. . . ."

October 19, 1994. Arundel argued before the Board, and now reiterates, that minutes from the May 4, 18, 25, and June 22, 1994 progress meetings, as well as Mr. Schwartz's letters of January 19, February 9, and March 9, 1995, constituted notice of this claim.

The progress meeting minutes simply reflect that the concrete work that is the subject of this claim was discussed by those attending the progress meetings. The minutes do not provide notice that Arundel intended to file a claim for this work.

Mr. Schwartz's January 19, 1995 letter states:

> [Arundel] will hold the MTA fully responsible for any resulting delays or disruptions to its work or period of performance, as well as those of its subcontractors, and expressly reserves the right to request an equitable adjustment for all resultant time and cost impacts. Pursuant to the MTA's express requests, as made at Progress Meeting No. 35, a fully detailed and documented request will be submitted. However, this must await project completion, when the full impact of the MTA's change directives will become clear, so that all resulting direct and indirect impacts can be tabulated and coordinated into a single package.

Even assuming, *arguendo,* that this provides notice of the claim, the letter was written on January 19, 1995, more than 30 days after the latest date in October 1994 that Arundel knew, or should have known of the basis for its claim. Likewise, Mr. Schwartz's letters of February 9 and March 9, 1995 were written more than 30 days after Arundel knew of the basis for its claim. Furthermore, the claim itself was not filed until June 3, 1997, more than

two years after the completion of all work on the project. The Board properly dismissed this claim under COMAR 21.10.04.02(C) for failure to comply with the time requirements of COMAR 21.10.04.02 (A & B).

4. *Claim No. 2041.* This claim concerns costs related to the performance of platform surveys, the installation of fiberglass angles between June 28, 1994, and October 9, 1994, and the costs of keeping survey equipment on the site for four months, until November 1994. Arundel argued to the Board, and now repeats, that the minutes of progress meetings held on May 25 and September 9, 1994, as well as letters dated January 19, 1995, and March 1, 1995, from Mr. Schwartz to MTA, constituted notice of its claim.

The minutes of the May 25 meeting list certain topics that were discussed, but do not contain any reference that could be construed as an intention to file a claim for the above work. The minutes of the September 9, 1994 meeting state, in regard to this work:

> [T]here is as [sic] substantial increase in the material and labor required for raising the edge of the platform above the existing elevation in lieu of maintaining the existing elevations as the drawings indicate. . . . Unfortunately our budget for this project can no longer withstand these cost[s] and we are developing our cost estimate and breakdown . . . and will forward these cost[s] to you. . . .

The reference simply states the existence of a dispute and does not provide notice that Arundel will file a claim for these costs.

Even if we were to assume that Mr. Schwartz's letters of January 19, 1995, and March 1, 1995, gave notice of the claim, the notice would have come more than 30 days after the latest date, in November 1994, that Arundel knew or should have known of the basis for its claim. Moreover, as the Board noted, Arundel did not file the claim until June 3, 1997, two and one-half years later. The Board did not err in dismissing Arundel's claims, pursuant to COMAR 21.10.04.02(C), for failure to comply with the time requirements for filing a claim.

5. *Claim No. 2042.* This claim pertains to changes to the handrail work made between March 16, 1994, and April 11, 1995. Arundel's position is that the minutes of a May 4, 1994 "Progress Meeting" constituted notice of the claim. The minutes state:

> Metalfab stated that rail pickets, as are, do not have full welds continuous on both sides of picket. . . . Metalfab and [Arundel] are in disagreement over this interpretation.[7] MTA directed [Arundel]/Metalfab to fill in welds. ACTION: MTA, [Arundel] & Metalfab for discussion-"Claims to be filed per G.P. 5.14 and G.P.-5.15."

Arundel also asserts that letters from Mr. Schwartz to Mr. Smith constituted notices of claims. In support of its position, Arundel refers to ten letters that Mr. Schwartz sent to the MTA on Arundel's behalf between December 22, 1994, and April 18, 1995. In the December 22, 1994 letter, Mr. Schwartz wrote: "It appears on its face that the Administration must accept full responsibility for [the

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[7] Metalfab is Arundel's subcontractor.

impact of extra-contractual requests], and that a change order will be required to make the Contractor whole again." In the December 30, 1994 letter, Mr. Schwartz stated:

> It is the Contractor's position that the application of adhesives is not a contract requirement, hence MTA's request that the test installation [of handrail endcaps] be done in the first place, and all other aspects of that directive constitute a change to the contract for which [Arundel] and Metalfab will jointly seek an equitable adjustment.

In regard to MTA's rejection of some sections of the handrail, Mr. Schwartz stated, in that same letter: "[T]he Contractor takes the position that MTA's actions were arbitrary and capricious, and constituted clear changes to the contract, for which [Arundel] and Metalfab intend to seek equitable adjustments." Mr. Schwartz further stated, "These matters will all be compiled and catalogued, and the resulting package(s) will become the subject of one or more requests for equitable adjustments. . . . "

The language of the letters and the statement in the minutes of the May 4, 1994 progress meeting indicate the nature of the dispute and that Arundel was going to file detailed claims for this work, in accordance with COMAR 21.10.04.02(B). Thus, it seems that Arundel did provide the notice required by COMAR 21.10.04.02(A).[8] Arundel did not file its detailed claims until June 3, 1997, more

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[8] COMAR 21.10.04.02(A) also requires that the notice be sent to the "appropriate procurement officer." Mr. Schwartz sent his letters to the resident engineer on the project. Neither party nor the Board addressed this issue, and neither shall we.

than two years after Arundel gave its notice and more than two years after all work on the project was complete, however. Therefore, the Board properly dismissed the claim under COMAR 21.10.04.02(C) for failure to file a timely claim.

6. *Claim No. 2043* This claim concerns costs related to the installation of "Type B" barriers on the mezzanine between May 4, 1994, and May 10, 1994. According to Arundel, a "Proposed Agenda" that Mr. Schwartz prepared for a meeting to be held on February 29, 1995 constituted its notice of claim.[9] The proposed agenda merely listed the MTA's refusal to issue written change notices for a wide variety of issues, including the "extra protective barriers," as a topic to be addressed at that meeting. This was not notice that Arundel intended to file a claim for the costs related to the extra protective barriers.

The Board found that the notice of the claim and the claim were filed concurrently on June 3, 1997, more than 3 years after the basis for the claim was known. On this basis, it properly dismissed the claim under COMAR 21.10.04.02(C).

7. *Claim No. 2044*. This claim relates to costs for idled work crews and track access delays between April 28, 1994, and December 5, 1994. Arundel contends that the minutes, prepared by MTA, of meetings held on June 29, 1994, and January 11, 18, and 25, and February 1, 1995, constituted notice of this claim.

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[9] In fact, there was no February 29 in 1995.

The minutes of the June 29, 1994 progress meeting state: "[Arundel] requested access to Track #2, Wednesday and Thursday from 8:00 PM to 4:00 AM [sic]. MTA to coordinate and provide 'Red Tag' and verification that track is not operational and power (third rail) is down during working hours." This language does not even indicate that there was a dispute surrounding the track access; it merely details the procedures by which Arundel would obtain track access on that particular Wednesday and Thursday. It does not provide notice that Arundel intended to file a claim for idle work time as a result of delays in obtaining access to the track. The minutes of the other meetings listed by Arundel contain similar statements and, likewise, do not provide notice that Arundel intended to file a claim for idle work crews.

The Board found that Arundel provided notice of its claim concurrently with the filing of its claim on June 3, 1997. It properly dismissed the claim, under COMAR 21.10.04.02 (C), for failure to comply with the timing requirements of COMAR 21.10.04.02(A) and (B).

8. *Claim No. 2045.* This claim is for labor, material, and equipment costs related to work performed on the automatic doors for the metro station from June 6 through December 13, 1994. Arundel contends that the minutes from the January 11, and 18, 1995 progress meetings provided notice of the claim.

The January 11, 1995 minutes, prepared by MTA, contain a single reference to the automatic doors, stating: "automatic doors need to be made operational; flashing needs to be finished and adjustment to operation be made

[sic]."[10] The January 18, 1995 minutes contain the exact same reference to the work on the automatic doors, and nothing further.[11] These references merely list work that needs to be performed. The statements do not even indicate that there was any dispute concerning the work performed for the automatic doors and do not provide notice of any intent to file a claim.

The Board found that notice of this claim was filed concurrently with the claim itself on June 3, 1997, over two years after Arundel knew of the basis for its claim. The Board did not err in dismissing the claim under COMAR 21.10.04.02.

9. *Claim No. 2093.* This claim pertains to extended overhead costs for delays and disruptions due to alleged contract changes during the entire term of the contract – March 9, 1994, to April 1995. Arundel cites to more than 35 references that it contends constitute notice of this claim. Even assuming, *arguendo*, that these references provided notice to the MTA of Arundel's intent to file a claim for these costs, Arundel did not file its claim until March

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[10] There is also a handwritten note in the margin next to this entry in the minutes. It is nearly illegible, but appears to read: "Q: caulked? [ ] K mfr. vs spec ES: [ ]." From what we are able to discern of this note, it does not provide notice that Arundel intended to file a claim for work related to the automatic doors. It appears to indicate that the writer needed to investigate how to install the doors.

[11] "The margin next to this entry contains another handwritten note. This note is also partially illegible, but it appears to read: "ES: malfunction phone # for [ ] JK: [ ] Manual (?) will,[ ] w/Atlantic." From what we are able to discern, this in no way constitutes notice that Arundel intends to file a claim.

10, 1998, nearly three years after the completion of all work on the project. The Board properly found that this claim was "not timely filed" and dismissed the claim under COMAR 21.10.04.02(C).

II.

Arundel contends that the Board erred in rejecting its argument that through "coercion and abuse" the MTA prevented it from filing timely claims. According to Arundel, the "coercive and threatening tactics, [forced it] not to comply with the 30-day notice of filing requirement," and denied it due process of law.

As we have indicated, to initiate a claim, a contractor must submit a notice of claim and must subsequently summit documentation of the claim to the procurement officer. The procurement officer is charged with issuing a final decision. SFP §§ 15-217 through 15-219 (a). The contractor may appeal that decision to the Board. SFP § 15-220. It then may petition the circuit court for judicial review of the Board's decision. SFP § 15-223.

The delegation of authority to the Board and the MTA is conditioned upon compliance with Division II of the State Finance and Procurement Article, which encompasses Titles 11 through 17. SFP § 12-101 (b) (2) and (3) delegates to the Board the authority "to implement the provisions of this Division II" and to "ensure that regulations of the primary procurement units provide for procedures that are consistent with this Division II."

The Board's decision to dismiss Arundel's claim was threefold. First, the Board determined that the 30-day

filing requirements of SFP § 15-217 (b) and § 15-219(a) are mandatory and therefore may not be waived, modified, or ignored by it or by the MTA. It also determined that compliance with the statutory requisites for filing of an administrative claim is a condition precedent to the filing of an action, and that failure to file a claim within the specified time bars assertion of that claim. *Johnson v. Maryland State Police,* 331 Md. 285 (1993); *Maryland State Police v. Warwick Supply and Equip. Co.,* 330 Md. 474 (1993) (failure to timely appeal to MSBCA).

Next, the Board found that even assuming the truth of Arundel's allegations of "coercion and abuse" by MTA employees, the State is not bound by the unauthorized acts of its agents. *See ARA Health Servs. v. Department of Public Safety,* 344 Md. 85, 95 (1996). Contractors who contract with a State agency are presumed to know the limitations placed by the legislature on the authority of an agency. *Id.*

Finally, the Board concluded that the timely filing of a notice of claim is a condition precedent to the State's waiver of sovereign immunity against state procurement contract claims. *Johnson,* 331 Md. at 293-96. In other words, the General Assembly's agreement to waive sovereign immunity against claims brought by State procurement contractors was conditioned upon satisfaction of the dictates of SFP §§ 15-217(b) and 15-219(a) and COMAR 21.10.04.02A and B. MTA officials lacked authority to waive the conditions for filing claims against the State.

Arundel argues that the Board erred in these conclusions and cites *Bayshore Industries, Inc. v. Ziats,* 232 Md.

167, 174-75 (1963), for support. In *Ziats*, a worker's compensation case, an employee claimed that she had not filed her claim in a timely manner because her superior had threatened that if she filed a claim she would be unemployable in the community. The employee sought to invoke an exception under the workers' Compensation Act that extended the statutory filing requirement by one year in cases of "fraud or estoppel." The Commission upheld her claim and applied the exception on the basis of equitable estoppel. The employer appealed, and the Court of Appeals affirmed the Commission's ruling.

The instant case is distinguishable from *Ziats*. Arundel is a contractor employed by the State, not an employee of a private company. Different procedures apply for a contractor of the State to file a claim than for an employee in a private company to do so. The legislature created certain limited conditions under which a contractor may sue the State. Sections 15-217(b) and 15-219(a) of the State Finance & Procurement Article and COMAR 21.10.04.02 do not provide a "fraud or estoppel" exception, or any other exception, for the late filing of a claim.

A contractor must follow the proper procedures to file a claim against the State, especially when having problems, as the Board noted:

> Indeed, where a contractor believes that State personnel are acting contrary to law and that such acts give rise to a contract claim, the Contractor should immediately invoke the remedial process provided by law by noticing a claim. This will then place a spotlight on such alleged illegal conduct and guarantee the contractor

> that its administrative right to prove the existence of such conduct and be compensated for [monetary] harm occasioned thereby will be available.

We agree with the Board's legal conclusion that the agents of the MTA did not have the authority to waive the mandatory time requirements.

Next, Arundel argues that the Board "disregarded the constitutional requirement of due process of law" when it determined that Arundel's allegations of coercion and abuse did not result in a constructive waiver of the requirement to file a timely notice of a claim. As Arundel puts it, "it is clear that State constitutional requirements of due process take precedence over statutory and regulatory sovereign immunity requirements, in as much as Article 2 of the Maryland Declaration of Rights renders the 14th Amendment of the U.S. Constitution to be the supreme law of the State."

Contrary to Arundel's argument, the Court of Appeals previously has held that requirements that condition a waiver of sovereign immunity on compliance with notice requirements are constitutional. *Johnson*, 331 Md. at 296.[12] Further, due process laws of the State are coextensive with the federal requirements of due process and one does not take precedence over another.

We find that the Board's conclusions of law were correct and, accordingly, the Board did not err.

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[12] The due process laws of the state are in pari materia with the federal requirements of due process. *Patterson v. State*, 356 Md. 677, 694 (1999); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27 (1980).

III.

Arundel contends that the Board "acted in concert with MTA to deny Arundel due process of law" by "setting out false statements of fact and law in its decisions." Arundel offers five examples of conduct by the Board that allegedly foreclosed Arundel from litigating its claims. Arundel's contentions are without merit.

First, Arundel argues that certain statements by the MTA during the Board hearing on December 19, 1996, influenced the Board's January 3, 1997 decision to dismiss Arundel's claims that the MTA's failure to put verbal field directives in writing denied Arundel due process. Arundel references the following passage from the December 19, 1996 hearing:

> [ARUNDEL]: [the MTA] say[s] that there is nothing in the statute, regulations or the contract that requires [it] to put [verbal directives] in[to] writing and, therefore, that is the end of it. That is not the end of it. . . .
>
> But the State specifically incorporates the 14th [A]mendment as state law. And the 14th [A]mendment says you must do things fairly.
>
> * * *
>
> [THE MTA]: [Arundel] mentioned the fact that there will be evidence to show, or at least it is their position that during the course of this contract the verbal directives were being issued and MTA was telling the contractor "if you don't like, stuff it."
>
> Well, it may be harsh, and it may not be fair. But, we would submit that there is a changes

> clause in the contract. The changes clause allows the State of Maryland to issue directives.
>
> It allows the State of Maryland to issue these directives, verbally or in writing. . . . They may not be fair, but that is the law. In [ ] fact, it allows the [contracting officer] to say, if you don't like it, stuff it.

We note that we are not reviewing the Board's December 19, 1996 decision [sic]; the claims that are the subject to this appeal resulted from the Board's December 17, 1998 decision. In any event, we fail to see how this interaction evidences that the Board falsely dismissed Arundel's due process claim. In fact, it demonstrates the opportunity Arundel had to present its arguments to the Board.

Second, Arundel argues that the Board in its December 17, 1998 opinion erred when it dismissed Arundel's claim number 2094, on the ground that the Board cannot direct a state agency to put certain matters in writing. Arundel contends that the Board "deliberately" did not address Arundel's request that it give recognition to its authority to issue declaratory rulings. This issue was not decided by the Board or raised during the hearing on December 4, 1998, and, therefore, we shall not address it.

We will not decide any issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131.

Third, Arundel contends the Board erred in dismissing the consequential damages portion of claim number 1940 on timeliness grounds on December 17, 1998, when it could have dismissed that issue when rendering its

January 3, 1997 decision. Arundel contends that by not ruling that claim 1940 was untimely two years earlier the Board "manipulated the administrative and judicial process, giving rise to extended delay and imposing greater costs on Arundel." Again, we are only reviewing the Board's decision of December 17, 1998. To the extent that the Board should have dismissed MSBCA claim number 1940 on timeliness grounds on January 3, 1997, we note that MTA did not move to dismiss claim 1940 on timeliness grounds and, therefore, different evidence was presented for the Board's ruling at that hearing than for the Board's ruling on December 17, 1998.

Fourth, Arundel argues that the Board was without jurisdiction to dismiss Arundel's allegations of agency misconduct "with prejudice" in its decision of October 7, 1998, and cites *University of Md. v. MFE Inc.*, 345 Md. 86, 103 (1997), for support. Specifically, Arundel argues that by dismissing with prejudice claims numbers 1988 through 1992 – containing Arundel's allegations of economic coercion, fraudulent enterprise, malicious interference, and tortious conduct – the "Board sought to foreclose such issues raised as well in all of Arundel's other claims." These claims were dismissed because Arundel did not file timely claims; the Board's "with prejudice" ruling does not prevent Arundel from raising the same issues in the present matter, nor does it prevent Arundel from raising the same issues as a defense to the State's liquidated damages claim.

Arundel makes the subcontention that in the Board's December 17, 1998 decision the Board inferred that it

would dismiss Arundel's allegations of agency misconduct concerning Arundel's assessment of liquidated damages against the MTA. Arundel believes that when the Board stated that Arundel would "be permitted to assert and attempt to prove such allegations" of the MTA's misconduct as a defense to the assessment of liquidated damages, "should [the MTA] . . . make a prima facie showing that the assessment of liquidated damages involved in MSBCA 1957 was appropriate," it was making an "inescapable inference" that, in a future hearing, it would dismiss Arundel's argument of agency misconduct. The "inescapable inference" Arundel refers to escapes us; we interpret the Board's statement as explaining the MTA's burden of proof for the assessment of liquidated damages.

Finally, Arundel contends that the Board "deliberately misstated the law in its decision of December 17, 1998, regarding the time for filing claims." As discussed in Part I of this opinion, none of Arundel's claims were filed in a timely manner. COMAR 21.10.04.02A, at all times relevant to this appeal, provided that a contractor must file a written notice of claim with the procurement officer within 30 days after the basis for the claim is known, or should have been known, whichever is earlier. Arundel did not follow this directive. If Arundel had followed the process outlined in State Fin. & Proc. §§ 15-217 (b) and 15-219 (a) and COMAR 21.10.04.02A and B, much of the delay and costs it incurred could have been avoided.

In sum, we note that when Arundel appealed the Board's January 3, 1997 decision to this Court on May 7, 1998, we responded to Arundel's allegation of the Board's

"collaboration, collusion, and dishonesty with the MTA" by stating:

> Without the slightest factual basis, appellant made the scandalous suggestion in its brief, and requested that we find that "the MTA colluded with MSBCA to deny Arundel its rights of due process of law and thus engaged in bad faith and was lacking in substantial justification in the proceedings before MSBCA." The unsupported and scurrilous attack by appellant's counsel on the integrity of two independent agencies of this State was totally irresponsible and unprofessional.

Arundel Engineering Corporation v. MTA, No. 98-1408 (Md. App. May 7, 1998). We echo these sentiments and remind Arundel that the numero s hearings, exhaustive pleadings, three Board decisions, two circuit court decisions, two appeals to this Court, and two petitions for certiorari, all demonstrate the ample due process the system has afforded it.

IV.

Arundel states that the circuit court, in affirming the Board's decision of December 17, 1998, "did not engage in an independent analysis of the Board's decision, did not discuss any of the voluminous evidence of record, and did not engage in analysis of the applicable law." Specifically, Arundel maintains that the circuit court "did not refer to or discuss any of the documentary evidence in the record to support the Board's decision" that Arundel did not file timely notice of its claims. This final argument is without merit.

We do not review the decision of the circuit court, but instead review only the factual and legal conclusions of the Board's ruling. As we have explained, we "look not *at* the decision of the circuit court but rather *through* the filter of the circuit court directly to the agency itself, in precisely the same way that the circuit court looked at it." *West Shore Communications, Inc.*, 110 Md. App. at 312-13.

Regardless, Arundel's attack on the circuit court's decision is unfounded and groundless. The circuit court, in reviewing the Board's decision, did not have to list each and every letter or document that Arundel maintains represented notice of its intent to file a claim. *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981) ("The exercise of a judge's discretion is presumed to be correct, . . . he is presumed to know the law, . . . and is presumed to have performed his duties properly.").

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR BALTIMORE CITY	*	
PETITION OF ARUNDEL ENGINEERING CORPORATION FOR JUDICIAL REVIEW OF DECISIONS OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS	*	CIVIL ACTION NO. 24-C-99-000074A
IN THE CASE OF ARUNDEL ENGINEERING CORPORATION UNDER MARYLAND MASS TRANSIT ADMINISTRATION Contract No. MTA 90-44-11 MSBCA Docket Nos. 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093, 2094	*	

MEMORANDUM OPINION AND ORDER

On March 9, 1994, the Mass Transit Administration ("MTA") awarded Contract No. MTA 90-44-11 to Arundel Engineering Corporation ("Arundel") for the rehabilitation of the Rogers Avenue Metro Station in Baltimore City. All work under, the contract was completed on or before April 30, 1995. Arundel has filed 17 appeals before the Maryland State Board of Contract Appeals (the "Board") relating to the Rogers Avenue contract.

In the present Petition, Arundel seeks judicial review of the Board's December 17, 1998 dismissal of 10 of these appeals: MSBCA Nos. 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094. Arundel did not timely appeal the Board's October 7, 1998 dismissal of 5 of its appeals:

MSBCA Nos. 1988, 1989, 1990, 1991 and 1992. Two of Arundel's appeals remain pending before the Board: MSBCA No. 1957 concerning Arundel's liability for liquidated damages for the late completion of the project; and MSBCA 1929 concerning Arundel's claim for fees incurred by its claims consultant.[1]

MTA filed motions for summary disposition requesting the Board to dismiss MSBCA Nos. 1940, 2039 through 2045, 2093 and 2094 because Arundel did not file notice of its claims within 30 days of the date it either knew or should have known of their basis as required by State Fin. & Proc. Code Ann. §§15-217(b) and COMAR 21.10.04.02A. Arundel argued both that it did in fact file notice of its claims within the required time periods and that it was prevented from filing timely notice of its claims by the coercive and improper behavior of MTA employees. In a Memorandum Opinion dated December 17, 1998. the Board dismissed Arundel's appeals on the grounds that none of the claims involved were filed within the mandatory filing periods and that, even if true, the behavior of MTA employees did not waive the mandatory filing requirements set forth by the Legislature.

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[1] On January 3, 1997, the Board partially dismissed MSBCA Nos. 1929 and 1940. Arundel appealed these interlocutory rulings along with a discovery ruling issued by the Board in MSBCA No. 1957. Both the Circuit Court for Baltimore City and the Court of Special Appeals dismissed Arundel's appeal on the ground that the Board's rulings were not final orders subject to judicial review.

THE BOARD'S FINDINGS OF FACT

For the purpose of MTA's motions for summary disposition, the Board assumed that the facts alleged by Arundel were true and resolved all legitimate inferences in favor of Arundel. In reaching its decision, the Board made factual determinations of the date Arundel either knew or should have known the basis of each of its claims and of the date Arundel filed written notice of each claims. The Board made the following specific findings:

1. **MSBCA 2039**

   a. On June 3, 1997 Arundel submitted Claim No. 1 which constituted both the notice of claim and claim upon which MSBCA No. 2039 is based.

   b. Claim No. 1 requests direct costs for labor, material and equipment for work related to the framing of the mezzanine expansion joint on June 14, 1994, the first pour of the mezzanine slab on June 15, 1994 and the rejection of the mezzanine slab on June 16, 1994.

   c. The last day on which Arundel claims it incurred any cost related to Claim No. 1 was February 26, 1995, the date that all work relating to the installation of the joint sealer was completed.

   d. Arundel did not file notice of its Claim No. 1 until over two years after Arundel knew of the basis for its claim.

2. **MSBCA 2040**

   a. On June 3, 1997 Arundel submitted Claim No. 2 which constituted both the notice of claim

and claim upon which MSBCA No. 2040 is based.

b. Claim No. 2 requests direct costs for labor, material and equipment for work related to concrete construction beginning in May of 1994 and continuing until October of 1994.

c. Claim No. 2 is based on events which occurred between May and October of 1994.

d. Arundel did not file notice of its Claim No. 2 until over two and one half years after Arundel knew of the basis for its claim.

3. **MSBCA 2041**

a. On June 3, 1997 Arundel submitted Claim No. 3 which constituted both the notice of claim and claim upon which MSBCA No. 2041 is based.

b. Claim No. 3 requests direct costs for labor, materials and equipment for work related to the performance of platform surveys between July 10, 1994 and July 25, 1994 and the cost of keeping survey equipment on the site for four months until November 1994 and the cost of installing fiberglass angles and associated work.

c. Claim No. 3 is based on events which occurred between July and November of 1994.

d. Arundel did not file notice of Claim No. 3 until two and a half years after Arundel knew of the basis for its claim.

4. **MSBCA-2042**

a. On June 3, 1997 Arundel submitted Claim No. 4 which constituted both the notice of claim

and claim upon which MSBCA No. 2042 is based.

b. Claim No. 4 requests direct costs for labor, material and equipment for work related to the refabrication and installation of handrails between April 15, 1994 and April 11, 1995.

c. Claim No. 4 is based on events which occurred between April 15, 1994 and April 11, 1995.

d. Arundel did not file notice of its Claim No. 4 until over two years after Arundel knew of the basis for its claim.

5. **MSBCA 2043**

a. On June 3, 1997 Arundel submitted Claim No. 5 which constituted both the notice of claim and claim upon which MSBCA No. 2043 is based.

b. Claim No. 5 requests direct costs for labor, material and equipment for work related to the installation of "J" bracket temporary safety barriers on the mezzanine between March 1994 and November 7, 1994.

c. Claim No. 5 is based on events which occurred between March of 1994 and November 7, 1994.

d. Arundel did not file notice of Claim No. 5 until over two and a half years after Arundel knew of the basis for its claim.

6. **MSBCA 2044**

a. On June 3, 1997 Arundel submitted Claim No. 6 which constituted both the notice of claim and claim upon which MSBCA No. 2044 is based.

b. Claim No. 6 requests direct costs for idled work crews resulting from the need to obtain identification badges on April 28, 1994 and track access delays between June 29, 1994 and December 5, 1994.

c. Claim No. 6 is based on events which occurred between April 28, 1994 and December 5, 1994.

d. Arundel did not file notice of Claim No. 6 until over two years later after Arundel knew of the basis for its claim.

7. **MSBCA 2045**

a. On June 3, 1997 Arundel submitted Claim No. 7 which constituted both the notice of claim and claim upon which MSBCA No. 2045 is based.

b. Arundel's Claim No. 7 requests direct costs for labor, material and equipment for work related to the automatic doors on the project.

c. Claim No. 7 fails to state the specific dates on which work on the automatic doors was performed. However, all work on the project was completed by the end of April, 1995.

d. Claim No. 7 was not filed until over two years after Arundel knew of the basis for its claim.

8. **MSBCA 2093**

a. On March 10, 1998 Arundel submitted Claim No. 8 upon which MSBCA No. 2093 is based. Arundel submitted an amended Claim No. 8 to MTA on April 3, 1998.

a [sic]. Claim No. 8 requests extended overhead costs for delays and disruptions due to alleged MTA changes.

c. Claim No. 8 is based on events which occurred between March 9, 1994 (the day the Contract was awarded) and the end of April, 1995 (the last day Arundel performed work on the project.)

d. Claim No. 8 was filed over two and a half years after Arundel knew of the basis for its claim.

9. **MSBCA Nos. 1940 and 2094**

a. Arundel filed its notice of claim in MSBCA No. 1940 no earlier than October 13, 1995. The notice of claim relates to financial and time damages allegedly resulting from MTA's policy of not reducing field directives to writing.

b. Arundel last performed work on the project on April 30, 1995.

c. Arundel's notice of claim filed on October 13, 1995 was filed more than five months after the time that Arundel knew or should have known of the basis of its claims.

d. Arundel refiled MSBCA No. 2094 on identical grounds as that previously set forth in MSBCA No. 1940.

e. The only relief requested in MSBCA No. 2094, is the same as that dismissed by the Board in MSBCA No. 1940.

Arundel presented to the Board numerous documents which it claims constituted notice of its claims within 30 days of the date Arundel either knew or should

have known of the basis of its claims. In finding that a specific document constituted notice of a claim, the Board determined that documents prior to that time did not constitute notice of the claim.

THE BOARD'S CONCLUSIONS OF LAW

In Title 15 of the State Finance and Procurement Article, the General Assembly established exclusive administrative proceedings for the resolution of contractor disputes arising out of state procurement contracts. The Legislature provided three consecutive administrative levels for resolving disputes, each of which must be completed before the contractor may proceed forward to the next. At the threshold level of these administrative procedures, the Legislature requires that a contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. State Fin. & Proc. Code Ann. §15-217(b). Pursuant to such statutory direction, the Board of Public Works adopted COMAR 21.10.04.02A which requires that a contractor "shall" file a written notice of a claim "within 30 days after the basis for the claim is known or should have been known, whichever is earlier," unless a lesser period is prescribed by law or by contract. State Fin. & Proc. Code Ann. §15-219(a) and COMAR 21.10.04.02B require a contractor to submit documentation of a claim within 30 days of the filing of notice of the claim. Consistent with the mandatory nature of these statutory filing requirements and the delegation of authority to implement the provisions of the General Procurement Law, COMAR 21.10.04.02C provides that a notice of claim or a claim that is not filed within these

required time periods "shall be dismissed." These statutory filing requirements are mandatory prerequisites to a contractor's administrative remedy.

In State Fin. & Proc. Code Ann. §§12-101(b)(2) and (3), the Legislature affirmatively charged the Board of Public Works with the responsibility of implementing and complying with the requirements of Division II of the State Finance and Procurement Article with includes the time requirements of §§15-217(b) and 15-219(a). Neither the Board of Public Works, MTA nor the Board of Contract Appeals have the authority to waive, modify or ignore these filing requirements which the Legislature has established as mandatory prerequisites to the Board's authority to award an equitable adjustment. Nor do they have the authority to waive the mandatory requirement that a contractor exhaust its administrative remedies at the agency level before the contractor can seek the jurisdiction of the Board.

The Board next addressed Arundel's argument that coercive and improper behavior by MTA employees waived or otherwise negated the 30 day notice of claim filing requirement. The Board assumed for the purpose of MTA's motions for summary disposition that Arundel's allegations of economic coercion by named and unnamed persons at MTA were true. Specifically, the Board assumed that:

i) Arundel was told not to file any claims until the "end of the job" or else reprisals would be taken and that MTA would refuse to accept and would not act on any claims until the end of the job.

ii) MTA issued contradictory oral directives and issued oral directives that increased the scope, duration and cost of the work but wrongfully and deliberately refused to put such oral directives in writing which caused one of the Arundel's subcontractors to go bankrupt and violated Arundel's rights under the contract and denied Arundel Constitutional due process.

The Board concluded that even if true the alleged acts were unauthorized because State employees are not authorized to engage in coercive acts designed to prevent a contractor from exercising its remedial rights under the General Procurement Law. As a matter of law, the State is not bound by the unauthorized acts of its employees. The Board is required by law to uphold the time requirements as actually set forth in the statute and its implementing regulations.

The Board determined that Arundel's allegations of economic coercion and deprivation of due process, assuming *arguendo* the truth thereof, do not result in a constructive waiver of the requirement to file a timely notice or in a legal defense to the filing requirements. The Board concluded that if a contractor believes that State personnel are acting contrary to law and that such acts give rise to a contract claim, the contractor should immediately invoke the remedial process provided by law by noticing a claim thus guaranteeing that the contractor's administrative right to prove the existence of such conduct and be compensated for monetary harm occasioned thereby will be available.

The Board also concluded that the timely filing of a notice of claim is a condition precedent to the State's waiver of sovereign immunity against State procurement contract claims. The Legislature has agreed to waive the State's sovereign immunity against claims brought by State procurement contractors only if certain conditions are met. These conditions include the timely filing of notice and documentation of a claim as defined by State Fin. & Proc. Code Ann. §§ 15-217(b) and 15-219(a) and COMAR 21.10.04.02A and B. Only the Legislature can extend, expand or modify these conditions on the obtaining of relief by a contractor through the administrative claims process. Assuming *arguendo* the truth of Arundel's allegations of improper conduct by MTA employees, it was not within the scope of their authority to waive the conditions for filing claims against the State. Therefore, the Board concluded that the alleged unauthorized conduct cannot bind the State or estop the State from insisting on compliance with filing requirements in administrative proceedings before the Board.

In addition to its dismissal of all of Arundel's appeals on timeliness grounds, the Board also dismissed MSBCA No. 2094 and that part of MSBCA No. 1940 which requested the Board to direct MTA to reduce verbal directives to writing. The Board found that Arundel refiled MSBCA No. 1940 as MSBCA No. 2094 and that the two appeals are based on identical issues (the issuance of verbal directives during the performance of the contract) and request identical relief (that the Board direct MTA to reduce verbal directives to waiting). The Board found as a matter of law that it does not have the authority to direct

a State agency to put certain matters in writing upon the agency's refusal to do so.

CONCLUSION

The Court finds that the Board's factual determinations are supported by substantial evidence and that the Board's conclusions of law are correct.

The documents which Arundel alleges were timely notice of its claims were not substantively sufficient to put the procurement officer on notice of exactly what Arundel's claims were or of the gravamen of each of its claims. The documents only indicate that there had been a history of problems. The Court finds substantial evidence to support the Board's finding that these documents did not constitute notice of Arundel's claims and that Arundel did not file actual notice of its claims until well beyond the mandatory 30 day period.

Arundel has requested this Court to find that the Board colluded with MTA to deny Arundel its rights and that the proceedings conducted by MTA and the Board were in bad faith and lacking in substantial justification. The Court has a great deal of difficulty when a tribunal is alleged to have participated in corrupt or collusive conduct. When someone makes a statement of that magnitude, it has to be taken seriously. The Court finds nothing in the record to support Arundel's allegations. The Court can understand the Court of Special Appeal's statement regarding Arundel's allegations of collusion between the Board and the MTA in Arundel's previous appeal of interlocutory rulings issued by the Board in MSBCA Nos. 1929, 1940 and 1957.

> Without the slightest factual basis, appellant made the scandalous suggestion in its brief, and requested that we find that "MTA colluded with MSBCA to deny Arundel its rights of due process of law and thus engaged in bad faith and was lacking in substantial justification in the proceedings before MSBCA." The unsupported and scurrilous attack by appellant's counsel on the integrity of two independent agencies of this State was totally irresponsible and unprofessional.

Unreported decision of the Court of Special Appeals of Maryland, No. 1408, September Term, May 7, 1998, page 11.

Accordingly, it is hereby this 28 day of April, 1999, ORDERED, that the decision of the Maryland State Board of Contract Appeals in the Appeal of Arundel Engineering Corporation under Maryland Mass Transit Administration Contract No. MTA 90-44-11, MSBCA Docket Nos. 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094 is AFFIRMED; and it is further

ORDERED, that costs are waived.

JUDGE THOMAS E. NOEL
The Judge's signature appears
on the original document.

THOMAS E. NOEL, JUDGE

Filed: April 28, 1999

MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ARUNDEL ENGINEERING CORPORATION	)	**Docket Nos. MSBCA 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094**
Under MTA Contract No. 90-44-11	)	
APPEARANCE FOR APPELLANT:		**Henry Eigles, Esq. Columbia, MD**
APPEARANCE FOR RESPONDENT:		**Julia Paschal Davis Assistant Attorney General Baltimore, MD**

MEMORANDUM OPINION BY CHAIRMAN HARRISON ON RESPONDENT'S MOTION TO DISMISS

Respondent, Mass Transit Administration (MTA) moves to dismiss the above captioned appeals on grounds that the Appellant failed to file timely notices of claims and documentation of those claims[1]. We shall deal only with the Respondent's allegations that Appellant failed to file timely notices of claims. If a contractor fails to file, without legal excuse, a timely notice of claim, the claim must be dismissed and the Board of Contract Appeals may not award the contractor an equitable adjustment.

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[1] Respondent also moves to dismiss the appeal docketed as MSBCA No. 2094 on grounds the Board lacks authority to grant the relief requested.

By way of background we note that these ten captioned appeals are part of the seventeen (17) total appeals filed by Appellant under the captioned contract for construction involving the rehabilitation of the Rogers Avenue Metro Station in Baltimore City[2]. All seventeen appeals involve in some fashion a claim by Appellant Arundel for at least "$300,000" for "financial and time damages" (MSBCA Docket No. 1940, amended upward in Appellant's Second Amended Complaint to $573,986), a claim on behalf of S.Z. Schwartz and Associates for engineering fees (MSBCA Docket No. 1929) and an affirmative State claim of $65,000 for liquidated damages (MSBCA Docket No. 1957). Additionally, the Appellant in its appeal docketed as MSBCA Docket No. 2093 seeks $269,763.54 related to "Claim #8" and seeks $221,870.05 for Claims Nos. 1 through 7 as set forth in MSBCA Docket Nos. 2039 through 2045. MSBCA Docket No. 2094 seeks relief previously requested in MSBCA Docket No. 1940 relating to alleged oral directives. The Board has previously granted Respondent's motion to dismiss that portion of MSBCA Docket No. 1940 and MSBCA Docket No. 1929 that requested that the Board direct MTA to reduce alleged "verbal" (oral) directives to writing. This interlocutory decision dated January 3, 1997 which is incorporated herein by reference was appealed by Appellant to the Courts and ultimately remanded back to the Board on grounds the Board's January 3, 1997 interlocutory decision did not constitute a final order as to the appeals and

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[2] MSBCA Docket Nos. 1929, 1940 and 1957 (consolidated) and MSBCA Docket Nos. 1988, 1989, 1990, 1991, 1992, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094.

was thus not ripe for judicial review. *Arundel Engineering Corporation v. Mass Transit Administration*, No. 1408, Md. Ct. of Spec. App. September Term, 1997 unreported (May 7, 1998)[3]; Certiorari Denied Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 24, 1998). Subsequently, by Memorandum Decision of October 7, 1998 on Respondent's further motion to dismiss for lack of jurisdiction the Board dismissed MSBCA Docket Nos. 1988, 1989, 1990, 1991 and 1992 with prejudice. The Board's decision of October 7, 1998 is incorporated herein by reference. We turn now to the motions to dismiss the above captioned appeals.

Preliminarily, we observe that since its inception seventeen years ago the Board has recognized, considered and granted motions for summary disposition[4], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of appeals. . . . " Section 15-210, Division II, State Finance and Procurement Article; See e.g. *Intercounty Construction Corporation*, MDOT 1036, 1 MSBCA ¶11 (1982); *Dasi Industries, Inc.*, MSBCA 1112, 1 MSBCA ¶49 (1983). In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition

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[3] The Court of Special Appeals' decision also deals with a discovery matter in MSBCA Docket No. 1957.

[4] The word disposition is used rather than judgement because the Board is not a court and has no equitable powers or equitable jurisdiction.

remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See *Mercantile Club, Inc. v. Scheer*, 102 Md. App. 757 (1995). The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. *Coffee v. Derby Steel Co.*, 291 Md. 241 (1981); *Russo v. Ascher*, 76 Md. App. 465 (1988); *King v. Bankerd*, 303 Md. 98, 111 (1985). See *Heat & Power Corp. v. Air Products*, 320 Md. 584, 591 (1990); *King v. Bankerd, supra*, 303 Md. at 111. In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See *Honaker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216 (1977); *Delia v. Berkey*, 41 Md. *App. 47 (1978), Affd.* 287 Md. 302 (1980).

The record reflects that Appellant has failed to file a timely notice of claim in any of the above-captioned appeals.

MSBCA 1940

We find that Appellant filed its notice of claim in MSBCA No. 1940 no earlier than October 13, 1995 and that such notice of claim relates to "financial and time damages" allegedly resulting from MTA's policy of not reducing field directives to writing. Appellant last performed work on the project on April 30, 1995. Thus Appellant's notice of claim filed on October 13, 1995 was

filed more than five months after the time that Appellant knew or should have known of the basis of its claims. See the Board's Memorandum Opinion of January 3, 1997 which is incorporated herein by reference at pages 6 to 7.

The issues raised by the Motions for Summary Disposition as we focus on MSBCA 1940 are (1) whether MTA personnel have the authority to waive the statutory and regulatory requirements based on statute regarding the filing of a timely notice of claim and (2) whether certain alleged conduct by MTA personnel otherwise results in a waiver of the statutory and regulatory requirements for filing of a timely notice of claim. For the reasons that follow we find that requirements for filing a timely notice of claim are not waived.

Statutory filing requirements are mandatory prerequisites to administrative remedy. In Title 15 of the State Finance and Procurement Article, the General Assembly established exclusive administrative procedures for the resolution of contractor disputes arising out of state procurement contracts. The Legislature provided three consecutive administrative levels for resolving disputes, each of which must be completed before the contractor may proceed forward to the next. First, in order to initiate the procedure, a contractor is required to submit timely notice and documentation of claim to the procurement officer for final decision.[5] Second, the contractor may appeal the final decision of the agency to the Maryland

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[5] State Fin. & Proc. Code Ann. §§15-217 through 219. This decision focuses on the failure of the Appellant to file a timely notice of claim under this statute and COMAR.

State Board of Contract Appeals (the Board).[6] Third, a contractor may petition the Circuit Court for judicial review of a final appealable decision issued by the Board.[7]

At the threshold level of these administrative procedures, the Legislature requires that a contract claim[8] shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. State Fin. & Pro. Code Ann. §15-217(b). Pursuant to such statutory direction, COMAR 21.10.04.02A was adopted by the Board of Public Works. That regulation requires that a contractor "shall" file written notice of its claim "within 30 days after the basis for the claim is known or should have been known, whichever is earlier", unless a lesser time period is prescribed by law or by contract. COMAR 21.10.04.02B further defines the documentation a contractor is required to file in support of its claim and the times for filing thereof. Consistent with the mandatory nature of the statutory filing requirements and the delegation of authority to implement the provisions of the General Procurement

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[6] State Fin. & Proc. Code Ann. §15-220.

[7] State Fin. & Proc. Code Ann. §15-223. See *Driggs Corporation v. Maryland Aviation Administration*, 348 Md. 389 (1998); *Arundel Engineering Corporation v. Mass Transit Administration*, No. 1408 Md. Ct. of Spec. App. September Term, 1997 unreported (May 7, 1998); Certiorari Denied Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 24, 1998).

[8] Contract claim is defined to mean a claim that relates to a procurement contract and includes a claim about the performance, breach, modification or termination of the procurement Contract. State Fin. & Proc. Code Ann. § 15-215(b).

Law, COMAR 21.10.04.02C provides that a notice of claim or a claim that is not filed within these required time periods "shall be dismissed." The essence of these requirements is contained in "GP-5.14 Claims" of the Contract herein.

In State Fin. & Pro. Code Ann. §§12-101(b) (2) and (3), the Legislature delegated to the Board of Public Works the authority "to implement the provisions of this Division II" (of the State Finance and Procurement Article, the General Procurement Law) and to "ensure that regulations of the primary procurement units provide for procedures that are consistent with this Division II. . . . "[9] Thus, the Legislature has affirmatively charged the Board of Public Works with the responsibility of implementing and complying with the requirements of Division II. The Legislature's delegation of authority to the Board of Public Works is conditioned upon compliance with Division II of the State Finance and Procurement Article which includes the time requirements of §15-217(b). Effective October 1, 1996, §15-219(a) sets forth a 30 day notice of claim filing requirement for construction contracts.

Under the General Procurement Law the Board of Public Works may control procurement by units[10] to

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[9] COMAR 21.03.01.01 provides that a "state agency may not enter into a procurement contract except as permitted under State Finance and Procurement Article, Division II, and this title."

[10] Unit is defined in the General Procurement Law to mean an officer or other entity that is in the Executive Branch of the State government and is authorized by law to enter into a procurement contract. State Finance & proc. Code Ann. § 11-101(x).

include MTA. Neither the Board of Public Works nor MTA have the authority to waive, modify or ignore the mandatory filing requirements of §15-217(b) and §15-219(a) included in Division II. Neither does this Board. While the Board of Contract Appeals has subject matter jurisdiction to determine whether a timely claim has been filed and, if not, whether a legal excuse for such failure may exist, once it is determined that the requirement has not been met or excused, the claim must be dismissed and the Board may not proceed further.

The Courts of Maryland have instructed us in other contexts that compliance with a statutory requirement for the filing of an administrative claim against the State is a condition precedent to the filing of an action, and that failure to file a claim within the specified time bars its later assertion. *Maryland State Police v. Warwick,* 330 Md. 474 (1993) (failure to file timely appeal to MSBCA); *Johnson v. Maryland State Police,* 331 Md. 285 (1993) (failure to submit claim under Maryland Tort Claims Act within 180 days after injury). In *Simpson v. Moore,* 323 Md.215 (1991), it was held that failure to timely file a claim under the Maryland Tort Claims Act barred the action, even though the State may have suffered no prejudice.

The reasoning of these decisions, taken together with the mandatory nature of the language of Section 15-217(b) of the State Finance and Procurement Article, compels the conclusion that Appellant's claims must be dismissed for failure to comply with the requirement to timely notice claims unless such requirement may be found to have been waived.

With the aforegoing as background and assuming *arguendo* (as we must for purposes of Respondent's motions for summary disposition) that Appellant's allegations of economic coercion by named and unnamed persons at MTA are true, does such conduct serve to waive or otherwise negate the aforementioned requirement to file a timely notice of claim? The essence of Appellant's allegations of economic coercion is that Appellant was told not to file any claims until the "end of the job" or else reprisals would be taken[11] and that MTA would refuse to accept and would not act on any claims until the end of the job. It is also alleged, and for purposes of Respondent's Motions we must assume the truth thereof, that MTA issued contradictory oral directives and issued oral directives that increased the scope, duration and cost of the work but wrongfully and deliberately refused to put such oral directives in writing which caused one of Appellant's subcontractors to go bankrupt and violated Appellant's rights under the contract and denied Appellant Constitutional due process.

As noted for purposes of Respondent's motions we must assume the truth of these allegations.[12] The acts

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[11] There is no evidence that the reprisals would involve physical violence or that Appellant would be physically restrained from filing claims before the end of the job. Presumably the alleged threatened reprisals consisted of Respondent's warnings of assessment of liquidated damages and that liquidated damages were actually assessed, which damages are the subject of the appeal in MSBCA 1957.

[12] We make no actual finding concerning the truth of Appellant's allegations of misconduct based on the record compiled in Appellant's seventeen (17) appeals filed to date.

encompassed by these allegations would be unauthorized, i.e. State employees are not authorized to engage in coercive acts designed to prevent the contractor from exercising its remedial rights under the General Procurement Law.

We note as an initial matter that according to the case law in Maryland the State is not bound by the unauthorized acts of its agents. *ARA Health v. Dept. of Public Safety*, 344 Md. 85, 95 (1996). Contractors who contract with a State agency are presumed to know the limitations placed by the Legislature on the authority of an agency. *Id.* "Persons who contract with the State do so at their peril when they fail to take notice of the limits of the agent's authority." *Id.*, citing *Schaeffer v. Anne Arundel County. Md.*, 17 F.3d 711, 714 (4th Cir. 1994). The State is not bound by the acts of its officials or employees acting beyond their actual authority regardless of the reasonableness of the beliefs of the other party. *Dept. of Public Safety v. ARA*, 107 Md. App. 445, 462-463 (1995), *Aff'd ARA Health v. Dept. Of Public Safety, Supra.* Officials or employees acting beyond the scope of their authority cannot waive a statutory or regulatory requirement nor can their conduct estop the State from raising noncompliance with the requirements as a defense. *Id.*[13] This case

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Appellant will, however, be permitted to assert and attempt to prove such allegations as a defense should Respondent meet its burden to make a prima facie showing that the assessment of liquidated damages involved in MSBCA 1957 was appropriate.

[13] The regulation under consideration in the instant decision, COMAR 21.10.04.02, does not contain language providing for waivers or exceptions as that found, for example, in COMAR 21.05.02.10 providing exceptions that would allow

law is binding on this Board and we have not been advised that it has been overidden by the General Assembly as regards the remedial rights afforded contractors by the General Procurement Law.

Thus MTA does not have the authority to waive time requirements which the Legislature and the Board of Public Works have established as mandatory prerequisites to this Board's Authority to award an equitable adjustment. Nor does MTA have the authority to waive the mandatory requirement that a contractor exhaust its administrative remedies at the agency level before the contractor can seek the jurisdiction of this Board. Accordingly, even if MTA personnel engaged in the conduct alleged by Appellant, they were not authorized to actually waive the time requirements for filing a notice of claim by extending the time for such filing until "the end of the job". This Board is required by law to uphold the time requirements as actually set forth in the statute and its implementing regulations.

Similarly, the specific allegations raised by Appellant herein of economic coercion and deprivation of due process, assuming *arguendo* the truth thereof, do not result in a constructive waiver of the requirement to file a timely notice of claim. The conduct by MTA personnel as alleged in these appeals does not constitute a legal defense to the requirement to file notices of claims within the 30-day time frames set forth in COMAR 21.10.04.02A. Indeed,

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consideration of a late bid where the lateness is attributable to the action or inaction of certain State employees.

where a contractor believes that State personnel are acting contrary to law and that such acts give rise to a contract claim, the Contractor should immediately invoke the remedial process provided by law by noticing a claim. This will then place a spotlight on such alleged illegal conduct and guarantee the contractor that its administrative right to prove the existence of such conduct and be compensated for momentary harm occasioned thereby will be available.

We would reach the same conclusion were we to view the matter from the perspective of waiver of sovereign immunity. The Legislature has agreed by waiving the State's sovereign immunity in contract that a contractor may file contract claims against the State. However, certain conditions apply. These conditions include the timely filing of notice and documentation of a claim as defined by §§15-217(b) and 15-219(a) of the State Finance and Procurement Article and COMAR 21.10.04.02A and B.[14] Only the Legislature can extend, expand or modify

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[14] In view of our determination that no timely notice of claim was filed pursuant to §15-217(b) and COMAR 21.10.04.02A, we shall not further decide whether Appellant's claims are also barred by the doctrine of sovereign immunity to the extent they are based on an alleged oral contract modification (rather than a written contract modification) which was beyond the scope of MTA's authority. The *ARA* decisions of the Court of Appeals and Court of Special Appeals referred to above suggest that such claims based on alleged oral contract modifications would be barred. We recognize the dichotomy presented where a contractor is required to act on an oral directive which may involve additional work at additional cost and must continue to work on the job and perform the additional work notwithstanding that if the oral directive is not

the conditions on the obtaining of relief by a contractor through the administrative claims process. See *The Driggs Corporation*, MSBCA 1262, 2 MSBCA ¶121 (1986). Therefore, assuming *arguendo* that MTA personnel did wrongfully and willfully refuse to reduce directives to writing and either advised Appellant not to file notices of claims until the end of the job or refused to accept notices of claims until the end of the job as alleged by Appellant, it was not within the scope of their authority to waive the conditions for filing claims against the State. Therefore, their alleged unauthorized conduct in not reducing directives to writing and purporting to extend the notice of claim filing requirements beyond thirty (30) days cannot bind the State or estop the State from insisting on compliance with such requirements in administrative proceedings before this Board.

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reduced to writing through the change order process the contractor may not legally be paid the cost of such additional work. We have chosen to briefly address the argument of counsel for Respondent, as argued in these appeals, that Appellant's failure to file a timely notice of claim requires that the appeals be dismissed on sovereign immunity grounds. We shall not discuss this argument in depth in view of our determination based on the facts herein that the Board may not further proceed due to the lack of timely notice of claim. In regard to the sovereign immunity argument, however, in a recent unreported decision, *Tschechtelin v. Samuels*, No. 231 (Md. Ct. Spec. App., Nov. 6, 1998), the Court of Special Appeals held that employment-related contract claims against the State which were not filed within a statutory deadline were barred by sovereign immunity. In *Tschechtelin*, the filing of a claim within the statutory time limit was deemed a condition precedent to the maintenance of a contract claim otherwise barred by the doctrine of sovereign immunity.

We have thus rejected Appellant's argument that it was not required to file timely notices of claims because such requirement was either waived or extended by the conduct of MTA personnel. However, Appellant also argues that, regardless of whether it may be waived or not, the thirty day requirement is unlawful. Up until October 1, 1996, State Fin. & Proc. Code Ann. §15-217(b) provided that a contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. The Board of Public Works promulgated such a regulation at COMAR 21.10.04.02A which at all relevant times herein provided that a contractor must file a written notice of claim with the procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier[15]. Appellant, citing *University of Maryland v. MFE incorporated/NCP Architects, Incorporated*, 345 Md. 86 (1997), argues that the Board of Public Works 30-day notice requirement as set forth in COMAR 21.10.04.02A is inconsistent with §15-217(b) as it existed prior to October 1, 1996 and is therefore unlawful. We reject such argument. Presumably it is based on Appellant's belief that 30 days is not a long enough time to comport with the expressions of fundamental fairness contained in the General Procurement Law at §11-201 or otherwise is inconsistent with legislative intent concerning the administrative resolution of construction contract disputes. We have noted that this Board is bound by the

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[15] For a general discussion of the scope of the authority of the BPW to issue procurement regulations see *Maryland State Police v. Warwick*, 330 Md. 474 (1993) at pp. 480 – 482.

regulations of the Board of Public Works. We find nothing inconsistent between the statute or its expressed legislative intent and the challenged regulation. We note that effective October 1, 1996, with respect to construction contracts the statute itself sets forth a 30 day filing requirement except to the extent a shorter period is described by regulations governing differing site conditions. State Fin. & Proc. Code Ann. §15-219 (a). The contract at issue (for the renovation and rehabilitation of a metro station) is a construction contract. See COMAR 21.01.02.01B(23).

Finally, Appellant, in addition to arguing that the 30-day notice of claim requirement set forth in COMAR 21.10.04.02A and GP-5.14 of the contract was waived by conduct of MTA personnel and that the regulation was unlawful, argues that COMAR 21.10.04.02A and GP-5.14 of the Contract do not apply to Appellant's claims arising out of alleged wrongful administration of the contract. We have previously rejected this argument in our Memorandum Opinion of October 7, 1998 dealing with certain other appeals by Appellant, which, as previously noted, is incorporated herein by reference. Therein we said:

> *Appellant argues that GP-5.14 of the contract which provides for filing of written notice of claims for damages with the Procurement Officer within a thirty (30) day period and COMAR 21.10.04.02A which likewise requires filing of a written notice of claim with the Procurement officer within thirty (30) days of when the contractor knew or should have known of such claim only apply to claims for "labor, materials and equipment." Appellant asserts that GP-5.14 and COMAR 21.10.04.02A do not apply to claims that are based upon damages arising from*

> *Appellant's alleged wrongful administration of the contract as represented, for example, by the allegations of economic coercion, malicious interference and tortious conduct. Appellant argues that claims involving alleged wrongful administration of the Contract should be brought pursuant to the Disputes Clause of the Contract, GP-5.15 and particularly Subsection C thereof. However, Subsections A and B of GP-5.15 acknowledge the supremacy of the General Procurement Law (Act) as set forth in the State Finance and Procurement Article and COMAR 21.10 dealing with administrative and civil remedies.*
>
> *Regardless of which General Provision of the Contract may apply, the Board holds that it only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 (Chapter 04 of COMAR 21.10) as that regulation implements the statutory provisions regarding final agency action in contract claims for construction contracts and appeal to the Board as set forth in Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article.*

Arundel Engineering Corporation, MSBCA 1988, 1989, 1990, 1991 & 1992, ___ MICPEL ___ (October 7, 1998) at p. 4.

We reject Appellant's argument that the notice of claim requirements do not apply to claims arising out of alleged wrongful administration of the contract in the above-captioned appeals as well.

Accordingly, we find that Appellant must have filed a timely notice of claim within 30 days after the basis for the claim was known or should have been known. None of the claims involved in the above-captioned appeals (to

include the claims involved in the instant focus on MSBCA 1940) were filed within thirty (30) days of the time Appellant knew or should have known of the basis for the claim, and, as discussed in more detail below, are required to be dismissed pursuant to COMAR 21.10.04.02C.

Thus, Appellant's claims encompassed by the appeal docketed as MSBCA 1940 that seek at least $300,000 for financial and time damages (and amended upward in Appellant's second amended complaint to $573,986) were not timely filed and are required to be dismissed. The Board had already dismissed what remained at issue in MSBCA 1940, i.e., Appellant's request that this Board direct that MTA reduce alleged oral ("verbal") directives to writing, by Memorandum opinion dated January 3, 1997. That Memorandum Opinion is incorporated herein by reference and for the reasons set forth therein the portion of MSBCA 1940 that deals with Appellant's request that this Board direct that MTA reduce alleged oral ("verbal") directives to writing is dismissed with prejudice for the reasons set forth herein and in the Board's Memorandum Opinion of January 3, 1997.

Accordingly, Appellant's entire appeal docketed as MSBCA No. 1940 is dismissed with prejudice.

MSBCA 2094

The Board lacks authority to direct that a State agency put certain matters in writing upon the agency's refusal to do so. We so said in our Memorandum Opinion of January 3, 1997 which, as noted above, is incorporated herein by reference.

Therefore, the identical relief requested in MSBCA No. 2094, wherein Appellant refiled on identical grounds as that previously set forth in MSBCA No. 1940, is beyond the Board's authority to grant and the appeal asking for such relief must be dismissed. Since this is the only relief requested in MSBCA No. 2094, the appeal in MSBCA No. 2094 is dismissed with prejudice.

We now turn to the remaining motions as they pertain to the remaining captioned appeals.

MSBCA Nos. 2039, 2040, 2041, 2042, 2043, 2044, 2045 and 2093

The Board will also dismiss with prejudice the appeals in MSBCA Nos. 2039, 2040, 2041, 2042, 2043, 2044, 2045 and 2093 due to Appellant's failure to file a timely notice of claim.

The Board finds that the applicable laws are the applicable provisions of the General Procurement Law and COMAR in effect prior to October 1, 1996. Application of such laws in effect after October 1, 1996 would, however, lead to the same result. The Board further finds that the contract was awarded on March 9, 1994 and Appellant last performed work on the project on April 30, 1995.

The following facts and decision focus on each particular appeal.

MSBCA 2039

1. On June 3, 1997 Appellant submitted Claim No. 1[16] upon which this appeal (2039) is based.

2. Claim No. 1 requests direct costs for labor, material and equipment for work related to the framing of the mezzanine expansion joint on June 14, 1994, the first pour of the mezzanine slab on June 15, 1994 and the rejection of the mezzanine slab on June 16, 1994.

3. The last day on which Appellant claims it incurred any cost related to Claim No. 1 was February 26, 1995, the date that all work relating to the installation of the joint sealer was completed.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 1 is based on events which occurred between June 14, 1994 and February 26, 1995. Appellant did not file Claim 1 until May 30, 1997, over two years later. Claim No. 1 was thus filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 1 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2039 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2039 is dismissed with prejudice.

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[16] Claim Nos. 1 through 7 (MSBCA Nos. 2039-2045) as filed on June 3, 1997 consisted of both the notice of claim and claim.

MSBCA 2040

1. On June 3, 1997 Appellant submitted Claim No. 2 upon which this appeal (2040) is based.

2. Claim No. 2 requests direct costs for labor, material and equipment for work related to concrete construction beginning in May of 1994 and continuing until October of 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 2 is based on events which occurred between May and October of 1994. Appellant did not file Claim No. 2 until June 3, 1997, over two and a half years later. Claim No. 2 was filed over two and one half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 2 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2040 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2040 is dismissed with prejudice.

MSBCA 2041

1. On June 3, 1997, Appellant submitted Claim No. 3 upon which this appeal (2041) is based.

2. Claim No. 3 requests direct costs for labor, materials and equipment for work related to the performance of platform surveys between July 10, 1994 and July 25, 1994 and the cost of keeping survey equipment on the

site for four months until November 1994 and the cost of installing fiberglass angles and associated work.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 3 is based on events which occurred between July and November of 1994. Appellant did not file Claim No. 3 until June 3, 1997, two and a half years later. Claim No. 3 was filed two and a half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 3 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2041 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2041 is dismissed with prejudice.

MSBCA 2042

1. On June 3, 1977, Appellant submitted Claim No. 4 upon which this appeal (2042) is based.
2. Claim No. 4 requests direct costs for labor, material and equipment for work related to the refabrication and installation of handrails between April 15, 1994 and April 11, 1995.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 4 is based on events which occurred between April 15, 1994 and April 11, 1995. Appellant did not file Claim No. 4 until

June 3, 1997, over two years later. Claim No. 4 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 4 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) or [§15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2042 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2042 is dismissed with prejudice.

MSBCA 2043

1. On June 3, 1977, Appellant submitted Claim No. 5 upon which this appeal (2043) is based.

2. Claim No. 5 requests direct costs for labor, material and equipment for work related to the installation of "J" bracket temporary safety barriers on the mezzanine between March 1994 and November 7, 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 5 is based on events which occurred between March of 1994 and November 7, 1994. Appellant did not file Claim No. 5 until June 3, 1997, over two and a half years later. Claim No. 5 was filed over two and a half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 5 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to

COMAR 21.10.04.02C, MSBCA No. 2043 must be dismissed. The Board, thus, lacks the authority to consider the claim and MSBCA 2043 is dismissed with prejudice.

MSBCA 2044

1. On June 3, 1997 Appellant submitted Claim No. 6 upon which this appeal (2044) is based.

2. Claim No. 6 requests direct costs for idled work crews resulting from the need to obtain identification badges on April 28, 1994 and track access delays between June 29, 1994 and December 5, 1994.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Claim No. 6 is based on events which occurred between April 28, 1994 and December 5, 1994. Appellant did not file Claim No. 6 until June 3, 1997, over two years later. Claim No. 6 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 6 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2044 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2044 is dismissed with prejudice.

MSBCA 2045

1. On June 3, 1997 Appellant submitted Claim No. 7 upon which this appeal (2045) is based.

2. Claim No. 7 requests direct costs for labor, material and equipment for work related to the automatic doors on the project.

3. Claim No. 7 fails to state the specific dates on which work on the automatic doors was performed. However, all work was completed by the end of April, 1995.

State Fin. & Proc. Code Ann. §15-217 (b) and COMAR 21.10.04.02A require a contractor to file written notice of a claim within 30 days after the basis for the claim is known or should have been known. Work was completed by the end of April, 1995. However, Claim No. 7 was not filed until over two years later. Claim No. 7 was filed over two years after Appellant knew of the basis for its claim.

Therefore, Claim No. 7 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) [or §15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2045 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2045 is dismissed with prejudice.

MSBCA 2093

1. On March 10, 1998 Arundel submitted Claim No. 8 to the MTA.

2. Appellant submitted an amended Claim No. 8 on April 3, 1998.

3. Claim No. 8 requests extended overhead costs for delays and disruptions due to alleged MTA changes.

State Fin. & Proc. Code Ann. §15-217(b) and COMAR 21.10.04.02A require a contractor to file written notice of a

claim within 30 days after the basis for the claim is known or should have been known. Claim No. 8 is based on events which occurred between March 9, 1994 (the day the Contract was awarded) and the end of April, 1995 (the last day Appellant performed work on the project.) Claim No. 8 was filed over two and a half years after Appellant knew of the basis for its claim.

Therefore, Claim No. 8 was not timely filed as required by State Fin. & Proc. Code Ann. §15-217(b) or [§15-219(a)] and COMAR 21.10.04.02A. Pursuant to COMAR 21.10.04.02C, MSBCA No. 2093 must be dismissed. The Board thus lacks the authority to consider the claim and MSBCA 2093 is dismissed with prejudice.

For the foregoing reasons, the above-captioned appeals are dismissed with prejudice. Wherefore, it is Ordered this 17th day of December, 1998 that the above-captioned appeals are dismissed with prejudice.

Dated: December 17, 1998

/s/ Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

/s/ Candida S. Steel
Candida S. Steel
Board Member

/s/ Randolph B. Rosencrantz
Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

> **(a) Generally.** – Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:
>
> (1) the date of the order or action of which review is sought;
>
> (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
>
> (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.
>
> **(b) Petition by Other Party.** – If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a) , whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1940, 2039, 2040, 2041, 2042, 2043, 2044, 2045,

2093 and 2094, appeal of Arundel Engineering Corporation under MTA Contract No. 90-44-11.

Dated: December 17, 1998

/s/ Mary F. Priscilla
Mary F. Priscilla
Recorder

BEFORE THE
MARYLAND STATE BOARD
OF CONTRACT APPEALS

In the Appeal of ARUNDEL ENGINEERING CORPORATION	)	**Docket Nos. MSBCA 1988, 1989, 1990, 1991 & 1992**
Under MTA Contract No. 90-44-11	)	

APPEARANCE FOR APPELLANT:
Henry Eigles, Esq.
Columbia, MD

APPEARANCE FOR RESPONDENT:
Julia Paschal Davis
Assistant Attorney General
Baltimore, MD

MEMORANDUM OPINION
BY CHAIRMAN HARRISON

Respondent, Mass Transit Administration, MTA, moves to dismiss the above-captioned appeals on the basis of lack of Board jurisdiction.

Preliminarily we observe that since its inception seventeen years ago the Board has recognized, considered and granted motions for summary disposition[1], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of

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[1] The word disposition is used rather than judgment because the Board is not a court and has no equitable power or equitable jurisdiction.

appeals. . . . " Section 15-210, Division II, State Finance and Procurement Article; See e.g. *Intercounty Construction Corporation*, MDOT 1036, 1 MSBCA ¶ 11 (1982); *Dasi Industries, Inc.*, MSBCA 1112, 1 MSBCA ¶ 49 (1983). Where the Board lacks jurisdiction there is no reason not to dismiss an appeal through preliminary process.

Issues of Board jurisdiction may often be determined as a matter of law. To the extent factual matter need be considered, the party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See *Mercantile Club, Inc. v Scherr*, 102 Md. App. 757 (1995). In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the record resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See *Honaker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216 (1979); *Delia v. Berkey*, 41 Md. App. 47 (1978), *Affd.* 287 Md. 302 (1980). See also *Coffee v. Derby Steel Co.*, 291 Md. 241 (1981); *Russo v. Ascher*, 76 Md. App. 465 (1988); *King v. Bankerd*, 303 Md. 98, 111 (1985). Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See *Heat & Power Corp. v. Air Products*, 320 Md. 584, 591 (1990); *King v. Bankerd, supra*, 303 Md. at 111.

As noted above, where the Board lacks jurisdiction, there is no reason not to dismiss an appeal through preliminary process and for the reasons that follow we

shall dismiss the above captioned appeals for lack of jurisdiction resolving as we must all permissible factual inference in Appellant's favor.

By way of background we note that these five captioned appeals are part of seventeen (17) total appeals filed by Appellant.[2] All seventeen appeals involve in some fashion a claim by Appellant Arundel for at least "$300,000" for "financial and time damages" (MSBCA Docket No. 1940, amended upward in Appellant's Second Amended Complaint to $573,986), a claim on behalf of S.Z. Schwartz and Associates for engineering fees (MSBCA Docket No. 1929) and an affirmative State claim of $65,000 for liquidated damages (MSBCA Docket No. 1957). Additionally, the Appellant in its appeal docketed as MSBCA Docket No. 2093 seeks $269,763.54 related to "Claim #8." The Board has previously granted Respondent's motion to dismiss that portion of MSBCA Docket No. 1940 and MSBCA Docket No. 1929 that requested that the Board direct MTA to reduce alleged verbal (oral) directives to writing. This interlocutory decision dated January 3, 1997 which is incorporated herein by reference was appealed by Appellant to the Courts and ultimately remanded back to the Board on grounds the Board's January 3, 1997 interlocutory decision did not constitute a final order as to the appeals and was thus not ripe for judicial review. *Arundel Engineering Corporation v. Mass Transit Administration*, No. 1408, Md. Ct. of Spec. App.

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[2] MSBCA Docket Nos. 1929, 1940 and 1957 (consolidated) and MSBCA Docket Nos. 1988, 1989, 1990, 1991, 1992, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094.

September Term, 1997 unreported (May 7, 1998)[3]; Certiori [sic] Denied Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 24, 1998).

MSBCA Docket Nos. 1988, 1990 and 1992

The appeals docketed by the Board as MSBCA Docket Nos. 1988, 1990 and 1992 involve *inter alia* a request by Appellant that the Board find that (1) Respondent engaged in improper economic coercion by threatening financial harm to Appellant if it exercised its remedial rights to pursue the claims process, (2) Respondent engaged in malicious interference with the contractual relations between Appellant and its subcontractors and Mr. Schwartz, (3) Respondent engaged in tortious conduct and fraudulent enterprise and denied Appellant due process and (4) Respondent failed and refused to acknowledge changes to the Contract under the Changes Clause of the Contract, GP-4.05, all as related in its claims in MSBCA Docket Nos. 1929 and 1940 and the State's assessment of liquidated damages in MSBCA Docket No. 1957. The activity complained of in MSBCA Docket No. 1988, i.e., economic coercion, malicious interference, tortious conduct and fraudulent enterprise and denial of due process allegedly occurred in 1994 and 1995. The State asserts that the notice of claims contained in Mr. Schwartz's letter of October 18, 1995 to the Procurement Officer involve claims that were known or should have been known by Appellant more than 30 days prior to the

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[3] The Court of Special Appeals' decision also deals with a discovery matter in MSBCA Docket No. 1957.

filing of Mr. Schwartz's October 18, 1995 letter with the Procurement Officer and thus the claims must be dismissed as untimely. In response Appellant argues that GP-5.14 of the contract which provides for filing of written notice of claims for damages with the Procurement Officer within a thirty (30) day period and COMAR 21.10.04.02A which likewise requires filing of a written notice of claim with the Procurement Officer within thirty (30) days of when the contractor knew or should have known of such claim only apply to claims for "labor, materials and equipment." Appellant asserts that GP-5.14 and COMAR 21.10.04.02A do not apply to claims that are based upon damages arising from Appellant's alleged wrongful administration of the contract as represented, for example, by the allegations of economic coercion, malicious interference and tortious conduct. Appellant argues that claims involving alleged wrongful administration of the Contract should be brought pursuant to the Disputes Clause of the Contract, GP-5.15 and particularly Subsection C thereof. However, Subsections A and B of GP-5.15 acknowledge the supremacy of the General Procurement Law (Act) as set forth in the State Finance and Procurement Article and COMAR 21.10 dealing with administrative and civil remedies.

Regardless of which General Provision of the Contract may apply, the Board holds that it only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 (Chapter 04 of COMAR 21.10) as that regulation implements the statutory provisions regarding final agency action in contract claims for construction contracts and appeal to the Board

as set forth in Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article.

Claim is broadly defined under COMAR 21.10.04.01B(1) to mean a complaint by a contractor or by a procurement agency relating to a contract. Appellant's allegations of economic coercion, fraudulent enterprise, various tortious activities and misconduct and denial of due process as set forth in the captioned appeals all, if true, potentially constitute a breach of contract giving rise to a contract claim relating to the contract, i.e., a complaint relating to the contract governed by the filing requirements of COMAR 21.10.04.02. Furthermore, COMAR 21.10.04.02 is binding on this Board and its provisions must be satisfied in order for this Board to have jurisdiction.[4] COMAR 21.10.04.02A requires the filing of a written notice of a claim relating to a contract with the appropriate Procurement Officer within thirty (30) days after the basis for the claim is known or should have been known. COMAR 21.10.04.02C requires dismissal of a claim not filed within thirty (30) days after the basis for the claim is known or should have been known. Because an untimely claim is required to be dismissed, the Board lacks jurisdiction to hear it.

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[4] The various cited provisions of COMAR 21.10.04 are regulations promulgated by the Board of Public Works (BPW) pursuant to statutory directive in the General Procurement Law. For a general discussion of the scope of the authority of the BPW to issue procurement regulations see *Maryland State Police v. Warwick*, 330 Md. 474 (1993) at pp. 480-482. The provisions of COMAR 21.10.04 are incorporated herein by reference.

Resolving all inferences in Appellant's favor we find Appellant admits (through its various assertions in the pleadings in these appeals that it does not have to file timely written notice of claims and its failure to identify any such timely written notice of claims) that it did not timely file written notice of claims related to its allegations of economic coercion, fraudulent enterprise, malicious interference and tortious conduct within thirty (30) days of the date it knew or should have known of such activity and the impact thereof as required by COMAR 21.10.04.02A. COMAR 21.10.04.02C requires that an untimely notice of claim or an untimely claim shall be dismissed. Thus, the appeal related to such untimely notice of claims and docketed as MSBCA Docket No. 1988 is dismissed with prejudice.

We turn now to specific consideration of MSBCA Docket Nos. 1990 and 1992. Claims alleging various breaches of contract for alleged agency misconduct in administering the contract as set forth in Mr. Schwartz's letters of October 25, 1995, October 30, 1995 and March 20, 1996, were not timely filed. Agency denial of these claims involving alleged misconduct in contract administration form the basis for portions of Appellant's appeals in MSBCA Nos. 1990 and 1992[5]. Appellant asserts that it is not required to file timely written claims relating to its

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[5] MSBCA Docket No. 1990 is an appeal from the absence of a final Procurement Officer's decision on Appellant's Request No. 10 as contained in Mr. Schwartz's letter of October 25, 1995. MSBCA Docket No. 1992 is an appeal from a Procurement Officer's decision of October 28, 1996 on Appellant's Request No. 13 as set forth in Mr. Schwartz's letter of December 7, 1995.

allegations of agency misconduct in contract administration because these are not claims for "labor, materials and equipment." For the same reasons as discussed above regarding the dismissal of MSBCA Docket NO. 1988, the Board also dismisses with prejudice those portions of MSBCA Docket Nos. 1990 and 1992 that deal with allegations of agency misconduct in contract administration.

The Board also dismisses with prejudice that portion of MSBCA Docket No. 1992 that challenges Respondent's failure to make documents available under the Maryland Public Information Act (PIA). This Board may exercise discovery powers under the General Procurement Law and COMAR after an appeal over which this Board has jurisdiction has been properly filed. The Board has no pre-appeal discovery jurisdiction, nor does the Board have any jurisdiction to judicially enforce the provisions of the PIA. Judicial enforcement of the PIA is reserved to the Circuit Courts. See § 10-623 of the State Government Article.

The Board also dismisses with prejudice the remaining portion of Docket No. MSBCA 1990 that deals with the application of the Changes Clause of the Contract, GP-4.05. Appellant asserts in MSBCA Docket No. 1990 that it filed an appeal with the Board on November 27, 1996 because the Procurement officer had not rendered a final decision within 180 days on Appellant's Request No. 10 (Claim No. 10) as set forth in Mr. Schwartz's letter of October 25, 1995. Resolving all inferences in favor of Appellant, the Board finds that Request No. 10 (Claim No. 10) constitutes a request for a decision from the Procurement Officer regarding whether certain actions or

omissions by MTA constitute a change under the Changes Clause ("Article") of the Contract, GP-4.05.

The Board only has such power and authority as specifically conferred by statute. It lacks equitable powers. See *The Driggs Corporation*, MSBCA 1262, 2 MSBCA ¶ 121 (1986) and cases cited at p.4. The Board does not have the authority or jurisdiction to issue a determination of the rights of the parties in contract dispute appeals absent a timely notice of claim and claim meeting all the requirements of COMAR 21.10.04. The requirements of COMAR 21.10.04 include the requirement set forth in COMAR 21.10.04.02B that a claim include the amount of the claim, i.e. cost quantification.[6]

Appellant has alleged no specific damages in MSBCA Docket No. 1990 at the agency level as required by COMAR 21.10.04.02B and therefore the jurisdictional threshold set out in COMAR 21.10.04.02B has not been met. COMAR 21.10.04.02C requires dismissal of such a

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[6] Section 15-219 of the State Finance and Procurement Article requires a contractor to submit within 30 days after submitting a notice of claim under a procurement contract for construction a written explanation that states the amount of the contract claim, the factors on which it is based and all relevant data and correspondence that may substantiate the claim.

claim.[7] Accordingly, Appellant's appeal in MSBCA Docket No. 1990 must be dismissed with prejudice.

MSBCA Docket Nos. 1989 and 1991

As indicated above, the Board does not have jurisdiction to enforce the PIA. Judicial enforcement of the PIA is reserved to the Circuit Courts by statute. See § 10-623 of the State Government Article. The Board does not have jurisdiction under the PIA to compel production of documents. The Board only has such authority to compel document production pursuant to the exercise of the Board's discovery rules and subpoena poorer (see the provisions of COMAR 21.10.05 and COMAR 21.10.06) in connection with an appeal over which the Board has jurisdiction. It has no pre-appeal jurisdiction to compel production of documents nor otherwise to direct how contracts between the private and public sectors are to be administered. Accordingly, the Board lacks jurisdiction over an appeal that seeks adjudication of rights under the PIA arising out of the MTA's response to Mr. Schwartz's letters of October 25 and 30, 1995 regarding regarding requests for documents contained therein. Therefore, Appellant's appeals in MSBCA Docket Nos. 1989 and 1991 are dismissed with prejudice.

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[7] We also observe that if the Board were to exercise authority akin to declaratory judgement power and only decide, as requested by Appellant, whether the Changes Clause, GP-4.05 applies to the facts alleged, the Courts would remand the matter to the Board for failure to issue a final decision that includes resolution of damages. See *Driggs Corporation v. Maryland Aviation Administration*, 348 Md. 389 (1998).

Wherefore, it is this 7th day of October, 1998, ORDERED that Appellant's appeals in MSBCA Docket Nos. 1988, 1989, 1990, 1991 and 1992 are dismissed with prejudice.

Dated: October 7, 1998 /s/ Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

/s/ Candida S. Steel
Candida S. Steel
Board member

/s/ Randolph B. Rosencrantz
Randolph, B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. – Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if

notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. – If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1988, 1989, 1990, 1991 & 1992, Appeal of Arundel Engineering Corporation under MTA Contract No. MTA-90-44-11.

Dated: October 7, 1998 /s/ Mary F. Priscilla
Mary F. Priscilla
Recorder

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1408

September Term, 1997

ARUNDEL ENGINEERING CORPORATION

v.

MARYLAND MASS TRANSIT ADMINISTRATION

Davis,
Salmon,
Bloom, Theodore G. (Ret'd, Specially Assigned),

JJ.

Opinion by Bloom, J.

Filed: May 7, 1998

Appellee, Maryland Mass Transit Administration (MTA), awarded to appellant, Arundel Engineering Corporation (Arundel), a construction contract (MTA contract No. 90-44-11) to renovate MTA's metro station at Rogers Avenue in Baltimore. Disputes arose between the parties, and Arundel filed separate appeals to the Maryland State Board of Contract Appeals (MSBCA or the Board) from three final decisions of MTA's Procurement Officer, Nicholas J. Kiladis.

On 3 January 1997, MSBCA dismissed parts of Arundel's appeals in two cases and declined to compel MTA to provide certain discovery in the third case. Arundel filed in the Circuit Court for Baltimore City a Petition for Judicial Review of the MSBCA's rulings. The court, Hammerman, J., presiding, dismissed the Petition for Review on the ground that the rulings of MSBCA that Arundel sought judicial review of were not final and therefore not reviewable. This appeal is from that dismissal of appellant's Petition for Judicial Review.

Appellant submits a total of seven questions for review by this Court. There is, of course, only one question properly before us: whether Judge Hammerman erred in dismissing appellant's Petition for Judicial Review. We hold that he did not err; therefore, we shall affirm the judgment of the circuit court. Our inclination is merely to state as our reason for affirmance that there is utterly no merit in and no logical basis or legal justification for this appeal. But since we are required by Section 15 of Article IV of the Maryland Constitution to file a written opinion, we shall furnish an explanation that contains some details. We begin with the elementary proposition of law applicable to all three matters before MSBCA:

> It is the general rule that "an action for judicial review of an administrative order will lie only if the administrative order is final."

U.S. Health, Inc. v. State, 87 Md. App. 116, 120, *cert. denied sub nom Comm'n on Human Relations v. U.S. Health, Inc.*, 324 Md. 69 (1991) (quoting *Mission Helpers v. Beasley*, 82 Md. App. 155, 161 (1990), which, in turn, had quoted

Holiday Spas v. Montgomery County, 315 Md. 390, 395 (1989)).

> To be "final for purposes of judicial review, the order must leave nothing further for the agency to do."

Holiday Spas, 315 Md. at 396 (quoting *Md. Comm'n on Human Rel. v. B.G.&E. Co.*, 296 Md. 46, 56 (1983)).

We shall now apply those principles to each of the three cases before MSBCA.

MSBCA No. 1929

The decision that generated the first appeal was the procurement officer's response to an eleven page letter on behalf of appellant from Stephen Z. Schwartz, whose engineering firm had been hired by Arundel. The principal subject matter of the letter was Schwartz's fee for engineering services and his (and Arundel's) contention that MTA should pay them for various reasons. A major complaint throughout the letter was that neither Schwartz nor Arundel had been able to get written responses to their questions about allowability and compensability of the engineering fees as reimbursable costs, or indeed, written responses to any inquiries. By letter dated 25 October 1995, Mr. Kiladis rendered his final decision with regard to the engineering fees: "I have determined that these costs are not recoverable as part of an equitable adjustment. It is well settled that such costs are not incurred in the performance of the changed work and you are not entitled to recover these costs in the manner claimed." Aside from the fact that the procurement officer's final decision was in writing, the letter of

25 October 1995 did not address Mr. Schwartz's complaints about "verbal" (obviously meaning "oral")[1] refusals to put anything in writing.

In its appeal to MSBCA from the final decision of 25 October 1995, Arundel requested the following relief:

> (a) That the decisional letter of 25 October 1995 be reversed or vacated,
>
> (b) That MTA "be required to reduce to writing positions it verbally [sic] announces on issues raised in the course of MTA's administration of construction contracts."
>
> (c) Attorneys' fees incurred in bringing the appeal,
>
> (d) Costs incurred in bringing the appeal.

MTA moved to dismiss that portion of Arundel's appeal that sought an order requiring MTA to reduce to writing positions it orally announces in the course of administering its contracts. It contended that it did not address that portion of Mr. Schwartz's letter that raised the issue of refusal to reduce to writing its orally expressed positions. Therefore, since the procurement officer has 180 days within which to respond to the

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[1] The adjective "verbal" means "pertaining to words," and thus refers to written as well as spoken communication. In informal speech, however, it is commonly used interchangeably with "oral," just as "impact" is commonly used as a verb and "parameters" is commonly used to mean whatever the speaker has in mind at the moment. In written communications, particularly in appellate briefs and other writings intended to persuade and influence the reader, an attempt to use precise words and proper grammar, punctuation, and syntax might induce a favorable reception by the reader.

request and only after 180 days would the failure to response be deemed a denial, the attempt to appeal on that issue was premature.

MSBCA agreed that it had no jurisdiction over the oral vs. written position dispute and dismissed that portion of Arundel's appeal. The Board retained jurisdiction over the fee dispute, despite Arundel's insistence that it had never submitted a claim for the engineering fees. MSBCA ruled that the Schwartz letter had raised an issue about allowance of such fees, that the procurement officer had specifically issued a final decision on that issue, and that Arundel's appeal sought to overturn that decision.

As near as we can understand from appellant's brief and oral argument, Arundel's argument before MSBCA, the circuit court, and this Court seems to be that Mr. Schwartz had not raised an issue about fees to be decided by the procurement officer, only an issue about MTA's refusal to reduce its decision to writing; that the appeal in No. 1929 did not concern the engineering fees since no claim for fees had been submitted; and, therefore, that dismissal of that part of the appeal concerning MTA's refusal to reduce positions to writing disposed of the entire appeal. That argument, and each of its subparts, is utter nonsense. Anyone reading Mr. Schwartz's letter without being blinkered by an *idée fixe* would reasonably interpret it as demanding a written decision from the procurement officer as to whether MTA would pay the engineering fees incurred by Arundel for work done by Mr. Schwartz. Mr. Kiladis's final decision letter of 25 October 1995 cannot reasonably be understood as anything other than a flat denial of MTA's obligation to pay any of Mr. Schwartz's fees. The first "count" of Arundel's

appeal from that decision, coupled with its first prayer for relief – that the 25 October 1995 decisional letter be reversed or vacated – cannot reasonably be interpreted other than an appeal from the response to Schwartz's request for a final decision on allowability of the consultant's engineering fee. Nevertheless, whether Mr. Kiladis was wrong in his interpretation of the Schwartz letter or in his response thereto, or whether MSBCA erroneously interpreted Arundel's appeal, misconstrued the issues before it, or wrongfully decided the case, are irrelevant. MSBCA dismissed a part of Arundel's appeal but retained jurisdiction to decide the rest of it. Its decision, right or wrong, was not final and, therefore, not reviewable by the circuit court.

MSBCA No. 1940

Arundel's second appeal to MSBCA was from a final decision letter from the procurement officer to Arundel, dated 26 December 1995. The decision letter was a response to a relatively brief (three pages) letter written on behalf of Arundel by its consulting engineer, Stephen Z. Schwartz. The stated subject of the Schwartz letter was:

> Request for Final Decision of the Procurement Officer: MTA's long-term policy and practices of failing or refusing to confirm its numerous verbal [oral] change directives in writing, despite the contractor's express request that it do so, and despite MTA's previously express commitment to comply.

The Schwartz letter asserted that, as a result of MTA's policy and practice of issuing oral change orders and then

refusing to confirm them in writing, Arundel had sustained and was continuing to sustain damages, for which it would seek equitable adjustments. It then reiterated that it constituted Arundel's formal request that Mr. Kiladis "issue a Final Decision of the Procurement Officer" setting forth MTA's official position with regard to Arundel's contention that MTA's policy and practices, as complained of in the letter, "constituted a breach of its contractual duties and obligations."

The procurement officer's final decision was twofold:

1. He denied that MTA has any "long term policy and practice" as described in Schwartz's letter, and asserted that MTA had no obligation under the contract to confirm verbal [oral] change directives in writing, it being the contractor's obligation to notify the procurement officer in writing if it regards the order as a change.

2. If Arundel believes that its costs were increased or its time on the job extended as a result of any oral directive, it could submit a claim to that effect. Although Mr. Schwartz asserted that Arundel was severely damaged, he supplied no specifics, and Arundel cannot be compensated by MTA for damages resulting from MTA's breach, so Arundel cannot be compensated for the losses asserted by Mr. Schwartz.

Arundel appealed that "final decision" to MSBCA, seeking relief as follows

(a) That MTA be required to reduce to writing its oral field directives (including instructions, interpretations, and clarifications) and

to cease and desist from its present policy of refusing to put such directives in writing.

(b) Damages, in an unspecified amount, but "at least $300,000 for financial and time damage resulting from Respondent's policy and/or practices of refusing to reduce to writing its verbal directives, etc."

(c), (d) and (e) Attorney's fees and costs incurred in the appeal and "all other relief that is just and equitable in the premises."

MTA moved to dismiss the appeal in its entirety, asserting that the obligation to confirm oral change directives is imposed by the contract on the contractor, not the State, and that in the absence of an adequately supported damage claim presented by Arundel and addressed by the procurement officer, the Board lacks jurisdiction to consider any claim for money relief. MSBCA granted MTA's motion in part: it dismissed that portion of the appeal that sought to compel MTA to reduce to writing its oral directives. Concluding that it could not tell from the record whether any claim for costs incurred by Arundel as a result of oral directives had ever been submitted to the procurement officer for final decision, or whether there were any facts forming a nexus between the challenged policy and the alleged occurrence of "financial and time damages," The Board denied MTA's request for dismissal of the appeal. It limited the appeal in No. 1940 to a determination of Arundel's entitlement of an equitable adjustment for "financial and time damages."

Whether the procurement officer or MSBCA was wrong in their respective decisions is not before this

Court. The only question for our consideration at this time is whether Judge Hammerman erred in concluding that Arundel was not entitled to judicial review because there was no final order by MSBCA. With respect to MSBCA No. 1940, as with MSBCA No. 1929, the dismissal of part of Arundel's appeal was not a final order.

MSBCA No. 1950 [sic]

Arundel's third appeal to MSBCA was from a final decision of the procurement officer that assessed Arundel $65,000 liquidated damages for late completion of the Rogers Avenue Metro Station rehabilitation contract. In a thirty page appeal complaint, Arundel set our numerous defenses to the assessment, which it asserted was unreasonable, unjust, unfair, and improper for a variety of reasons that do not concern us here. Subsequently, in a Prehearing Conference Brief on the three consolidated appeals, Arundel raised the following issue before the Board:

> Whether Respondent has denied Appellant equal protection of the law when rendering an assessment of liquidated damages against Appellant and not against the prime contractor for the WSC station project inasmuch as both prime contractors performed similar contracts in a concurrent time frame and were similarly situated.

Shortly after filing its prehearing conference brief, Arundel filed a Notice of Appellant's First Request for Production of Documents, followed by interrogatories propounded to MTA. In responding to both, MTA objected to certain interrogatories and to requests to produce

certain documents; it also insisted that it would not produce documents tagged by Arundel for copying until Arundel paid MTA $2,434.24 for documents previously copied in response to Arundel's Public Information Act request. Those responses were met by Arundel's Motion for Order to Compel Responses to Appellant's First Set of Interrogatories and First Request for Production of Documents. That motion was later supplemented. MTA's response to Arundel's motions to compel discovery was combined with its counter-motion to compel Arundel to respond to its interrogatories and to produce the documents it requested.

Following a hearing on both parties' motions to compel, the Board orally denied Arundel's motion with respect to three interrogatories and two requests for documents. That ruling was the third MSBCA decision challenged in Arundel's petition for judicial review.

Recognizing, at least, that the discovery ruling was not a final disposition of its appeal in MSBCA No. 1957, Arundel asserts that the ruling was a judicially reviewable interlocutory decision under the collateral order doctrine. Pellucidly, there is no merit to that contention. Arundel asserts that, without the requested discovery that MSBCA's ruling denied it, its right to litigate the denial of the equal protection of the law issue that Arundel raised in its complaint was foreclosed. Appellant's claim that the adverse discovery ruling forecloses its right to litigate its equal protection defense to the liquidated damage assessment is ridiculous. The ruling may make it difficult to prove its defense; but even if it makes proof of the defense impossible, it does not foreclose Arundel's right to litigate the issue. If the issue is a

legitimate one, and if it cannot be asserted effectively as a defense because of the Board's discovery ruling, the issue will be judicially reviewable after the conclusion of the appeal before the Board and the rendering of a final decision on that appeal.

To be appealable under the collateral order doctrine, an order " ' "must [(1)] conclusively determine the disputed question, [(2)] resolve an important issue, [(3)b] completely separate from the merits of the action, and [(4)] be effectively unreviewable on appeal from a final judgment." ' " *County Comm'rs of Frederick County v. Schrodel*, 320 md. 202, 211 (1990); quoting *Clark v. Elza*, 286 Md. 208, 213 (1979), which, in turn, had quoted *Peat & Co. v. Los Angeles Rams*, 284 Md. 86, 92 (1978). Because the discovery ruling by MSBCA can be effectively reviewed by a judicial tribunal on a petition for judicial review of the final decision of the Board, the interlocutory discovery ruling is neither final nor an appealable (judicially reviewable) collateral order.

Having covered, in this opinion, the nature of the administrative rulings on which appellant sought judicial review by the Circuit Court for Baltimore City, we reiterate what we said before: Judge Hammerman did not err and was entirely correct when he dismissed appellant's petition of judicial review because none of the decisions of MSBCA that appellant wanted the court to reverse were final orders.

One final comment is in order. Without the slightest factual basis, appellant made the scandalous suggestion in its brief, and requested that we find that "MTA colluded with MSBCA to deny Arundel its rights of due

process of law and thus engaged in bad faith and was lacking in substantial justification in the proceedings before MSBCA." The unsupported and scurrilous attack by appellant's counsel on the integrity of two independent agencies of this State was totally irresponsible and unprofessional.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

BEFORE THE
MARYLAND STATE BOARD
OF CONTRACT APPEALS

In the Appeal of	)	
ARUNDEL	)	
ENGINEERING	)	**Docket Nos. MSBCA**
CORPORATION	)	**1929, 1940 & 1957**
	)	
Under Mass Transit	)	
Administration Contract	)	
No. MTA-90-44-11	)	
	)	

APPEARANCE FOR APPELLANT:
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APPEARANCE FOR RESPONDENT:
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Assistant Attorney General
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MEMORANDUM OPINION BY CHAIRMAN HARRISON ON RESPONDENT'S MOTION TO PARTIALLY DISMISS MSBCA 1929 AND FULLY DISMISS MSBCA 1940

Respondent, Mass Transit Administration, (MTA) moves to dismiss a portion of MSBCA 1929 and all of MSBCA 1940 in the above consolidated appeals arising out of a contract for construction as defined in COMAR 21.01.02.01(23) and involving the rehabilitation of the Rogers Avenue Metro Station in Baltimore City. For the reasons that follow we shall grant the motion in part and deny the motion in part.

Preliminarily we observe that since its inception fifteen years ago the Board has recognized, considered and

granted motions for summary disposition[1], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of appeals. . . . " Section 15-210, Division II, State Finance and Procurement Article; See e.g. *Intercounty Construction Corporation*, MDOT 1036, 1 MSBCA ¶ 11 (1982); *Dasi Industries. Inc.*, MSBCA 1112, 1 MSBCA ¶ 49 (1983).

In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See *Mercantile Club, Inc. v Scheer*, 102 Md. App. 757 (1995). In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See *Honaker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216 (1979); *Delia v. Berkey*, 41 Md. App. 47 (1978), *Affd.* 287 Md. 302 (1980).

The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. *Coffey v. Derby Steel Co.*, 291 Md. 241 (1981); *Russo v.*

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[1] The word disposition is used rather than judgment because the Board is not a court and has no equitable powers or equitable jurisdiction.

Ascher, 76 Md. App. 465 (1988); *King v. Bankerd*, 303 Md. 98, 111 (1985). Therefore, summary disposition is not appropriate if a general issue of material fact is in dispute. Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See *Heat & Power Corp. v. Air Products*, 320 Md. 584, 591 (1990); *King v. Bankerd, supra*, 303 Md. at 111.

A. MSBCA 1929

Appellant's Complaint in MSBCA No. 1929 consists of two counts. In Count I, Appellant argues that the final decision issued by the Procurement Officer on October 25, 1995 should be reversed or vacated because it responded to a claim that Appellant had not submitted. According to Appellant the Procurement officer was asked to rule on MTA's failure as a matter of contract administration to set forth in writing its position regarding the engineering fees asserted to be due to S.Z. Schwartz & Associates, Inc. for services allegedly rendered to Appellant that at least in part, benefited the Contract performance. Appellant complains that instead, the Procurement Officer addressed the recoverability of those fees.

The Procurement Officer's final decision of October 25, 1995 responded to an October 18, 1995 letter submitted to MTA by S.Z. Schwartz & Associates, Inc. on behalf of Appellant which was stated to be on the following:

SUBJECT. Request for Final Decision of the Procurement Officer. MTA's verbal denial of the allowability of this firm's fees for professional Engineering services rendered in connection with the subject contract, coupled with MTA's refusal to reduce any of its positions to writing.

The above reference from the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995 thus identifies two topics for consideration by the Procurement Officer. 1) MTA's verbal denial of Appellant's claim for engineering services; and 2) MTA's alleged refusal to set forth that denial in writing.

The same two topics are identified on page 10 of the October 18, 1995 letter, which requests that a final decision be rendered "on each of the following aspects." These "aspects" were MTA's verbal refusal to accept responsibility for Appellant's engineering costs, and to process for payment Appellant change proposals which included said costs (items a and b); and, the refusal of MTA to set forth its position on these matters in writing (items c and d).

In response to the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995, the Procurement Officer issued a final decision dated October 25, 1995 which is the subject of this appeal. As requested by Appellant, the final decision addressed MTA's verbal refusal (denial) to acknowledge responsibility for Appellant's engineering fees. The Procurement Officer found that the engineering fees which Appellant sought to recover were claims for consultant costs which the Procurement Officer found as

a matter of law were not recoverable. Since this Procurement Officer's October 25, 1995 decision responded to a matter which the contractor presented to the Procurement Officer for resolution, the Board has jurisdiction to hear the matter on appeal, and to adjudicate whether or not the engineering costs incurred by Appellant are recoverable as part of an equitable adjustment.[2]

Although the October 25, 1995 final decision addressed Appellant's request for a final decision on MTA's refusal to pay engineering costs, the Procurement Officer did not address the request for a final decision on MTA's alleged failure during contract administration to express its position on this issue in writing. MTA thus argues that this Board lacks jurisdiction to consider the failure to express a position in writing issue since there is no final agency decision thereon. MTA argues that pursuant to COMAR 21.10.04.04E(1), the Procurement officer had 180 days to respond to this request, or until April, 1996. Thus, according to MTA, the Procurement Officer's failure to reach a decision by April, 1996 is deemed a denial which, pursuant to COMAR 21.10.04.04E(2), may be appealed by Appellant but which to date has not been

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[2] Respondent agrees the Board has jurisdiction to hear this matter of Appellant's *entitlement* to engineering fees. Appellant, however, argues that the October 18, 1995 letter is not a claim for the engineering fees themselves and thus the Board lacks jurisdiction to hear any claim for engineering fees. The Board finds that its jurisdiction has been properly invoked concerning Appellant's claim for engineering fees as clearly set forth in the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995. This October 18, 1995 letter speaks for itself and is incorporated herein by reference.

appealed.[3] The notice of appeal filed by S.Z. Schwartz & Associates, Inc. on behalf of Appellant on November 23, 1995 from the Procurement Officer's final decision of October 25, 1995 did not serve that purpose because, at that time, the 180 day period had not yet expired. Until Appellant files a notice of appeal challenging the Procurement Officer's failure to render a decision on MTA's alleged failure to express its position regarding engineering fees in writing, we agree that this Board has no jurisdiction to consider that claim.

Appellant, however, asserts that the 14th Amendment to the U.S. Constitution and the Maryland Constitution require the Board to hear the issue of whether verbal directives are legal and whether the alleged failure to put such in writing is legal from a deprivation of a property or liberty interest perspective.

The Board agrees that it has jurisdiction to hear and determine a constitutional issue in the exercise of its statutory duty to resolve disputes under § 15-211(a), Division II, State Finance and Procurement Article (SF). See, for example, *Titan Group, Inc.*, MSBCA 1135, 1 MSBCA ¶ 63 (1983) at pp 6-8 (Contract Dispute); *Rainbow Interior*

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[3] MTA argues on the merits that no provision of Maryland's General Procurement Law, or of Contract No. MTA-90-44-11 (to include the federal grant agreements incorporated therein), obligated MTA to confirm in writing its verbal communications rejecting Appellant's fees. MTA asserts that under the General Provisions of the Contract (GP-4.405, "Differing Site Conditions," GP-4.06, "Changes;" GP-5.14, "Claims;". GP-5.15, "Disputes;" GP-9.01, "Scope of Payment") the obligation of setting forth positions in writing falls upon the contractor, not the owner.

Landscapers, MSBCA 1231, 1 MSBCA ¶ 102 (1985) (Bid Protest).

However, the Board believes that the administrative claims process as set forth in SF § 15-219 & § 15-220 that is the threshold to exercise of Board jurisdiction satisfies the 14th Amendment and Maryland Constitution relative to providing an effective administrative remedial forum (which is subject to judicial review) to address and redress any alleged liberty or property interest deprivation that may be involved in a State procurement dispute. The Board also believes that this administrative process must be followed. Appellant maintains that it is not required to follow the mandatory claims process set forth in SF § 15-219 and COMAR 21.10.04 because the alleged wrong and the nature of the relief sought involves a liberty or property interest under the 14th Amendment and the Maryland Constitution. The Board, as noted, disagrees because it finds (1) the administrative claims process (which is subject to judicial review) to be adequate to protect the liberty and property interest that private and corporate citizens have in State procurement, and (2) it finds such administrative claims process must be invoked as a condition to this Board's exercise of jurisdiction. Thus we reject Appellant's argument calling for Board jurisdiction based on constitutional grounds.

We also decline to accept jurisdiction for a more fundamental reason. Appellant asks this Board to direct that a State agency put certain matters in writing upon the agency's refusal to do so. The Board lacks jurisdiction to grant such relief. The Board has jurisdiction only to resolve disputes. It lacks jurisdiction to direct an agency in matters of contract administration.

Lacking jurisdiction to grant such relief we would therefore dismiss on its merits that portion of MSBCA 1929 that requests the Board to require MTA to reduce alleged verbal directives to writing. We shall proceed, however, to adjudicate Appellant's entitlement to engineering costs.

B. MSBCA 1940

By letter dated October 13, 1995, S.Z. Schwartz & Associates, Inc. submitted on behalf of Appellant a request for a final decision of the Procurement Officer on two issues. The first was as follows:

> *MTA's long-term policy and practice of failing and refusing to confirm its numerous verbal change directives in writing, despite the Contractor's express request that it do so, and despite MTA's previous express commitment to comply.*

The letter also asserted as another related issue that MTA's failure to confirm verbal directives in writing "severely damaged" Appellant, but failed to specify in this letter the nature and/or amount of the damages incurred. However, this letter referred to other letters that allegedly specified the damages incurred or anticipated to be incurred. The Procurement Officer issued a final decision on December 26, 1995. The final decision denied that MTA had the "long-term policy" alleged by Appellant; denied that MTA was legally obligated to confirm its verbal directives in writing; and denied for lack of substantiation any claim for damages.

Appellant's claim in MSBCA 1940 that MTA failed to confirm verbal directives in writing is closely akin to its

claim in MSBCA 1929 that MTA failed to reduce to writing its verbal position regarding engineering fees. For the same reasons that apply to MSBCA 1929, that portion of MSBCA 1940 that requests the Board to direct MTA to reduce alleged verbal directives to writing is dismissed.

We will not dismiss that portion of MSBCA 1940 that may constitute a claim for damages, because resolving all inferences in favor of Appellant we find that the October 13, 1995 letter may constitution [sic] a claim for damages resulting from alleged extra work arising out of the alleged oral directives.

Appellant's prayer for relief in its complaint before the Board seeks from MTA payment of at least "$300,000" for "financial and time damages" allegedly resulting from the policy of not reducing verbal field directives to writing. However, we cannot determine from the record whether or not any claim for costs incurred by Appellant due to verbal field directives has ever been submitted by Appellant to the Procurement officer for final decision, nor whether Appellant has or has not submitted to the Procurement Officer any facts which would form a nexus between the challenged policy and the alleged incurrence of "financial and time damages." Since these action[s] necessary to Board jurisdiction have not on this record been shown not to have occurred, the Board will not dismiss the appeal.

Accordingly, MSBCA No. 1929 is to be limited to adjudicating Appellant's entitlement to engineering costs. Appellant's claim regarding MTA's failure to set forth its position in writing is dismissed. That portion only of MSBCA 1940 which challenges MTA's alleged refusal to

confirm verbal directives in writing is dismissed. MSBCA 1940 is to be limited to determining Appellant's entitlement to an equitable adjustment far "financial and time damages." So Ordered this 3rd day of January, 1997.

Dated: January 3, 1997

/s/ Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

/s/ Candida S. Steel
Candida S. Steel
Board Member

/s/ Randolph B. Rosencrantz
Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. – Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. – If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Memorandum Opinion on Respondent's Motion to Partially Dismiss MSBCA 1929 and Fully Dismiss MSBCA 1940 in MSBCA Docket Nos. 1929, 1940 & 1957, appeal of Arundel Engineering Corporation under Contract No. 90-44-11.

Dated: 1/3/97

/s/ Mary F. Priscilla
Mary Priscilla
Recorder

ARUNDEL ENGINEERING CORPORATION	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	
MARYLAND MASS TRANSIT ADMINISTRATION	*	Petition Docket No. 387 September Term, 2001
	*	(No. 554, Sept. Term, 1999, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: November 9, 2001

CONSTITUTION OF THE UNITED STATES
Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial offices of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or

as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MARYLAND CODE
CONSTITUTION OF MARYLAND
DECLARATION OF RIGHTS (1995)

Article 2. United States constitution; laws and treaties supreme law of State

The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.

(1996)

Article 24 Due process

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

"[Due process clause of] Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution have the same meaning, and that Supreme Court interpretations of the Fourteenth Amendment function as authority for interpretation of Article 24." *Pitsenberger v. Pitsenberger,* 287 Md. 20, 27, 410 A.2d 1052, 1056 (1980).

Md. Code STATE GOVERNMENT Art.
(Md. Administrative Procedure Act) (1995)

Sec. 10-201. Declaration of policy

The purpose of this subtitle is to:

(1) ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and

(2) promote prompt, effective, and efficient government.

Md. Code STATE FINANCE AND PROCUREMENT Art. (1995)

Sec. 12-101. Board Authority

(a) Scope of section. – This section does not apply to capital expenditures by the Department of Transportation or the Maryland Transportation Authority, in connection with State roads, bridges, or highways, as provided in § 12-202 of this title.

(b) Authority. –

(1) The Board [of Public Works, § 11-101(d)] may control procurement by units.

(2) To implement the provisions of this Division II, the Board may:

(i) set policy;

(ii) adopt regulations, in accordance with Title 10, Subtitle 1 of the State Government Article; and

(iii) establish internal operational procedures consistent with this Division II.

(3) The Board shall ensure that the regulations of the primary procurement units provide for procedures that are consistent with this Division II and, to the extent the circumstances of a particular type of procurement or a particular unit do not require otherwise, are substantially the same.

(4) The Board may delegate any of its authority that it determines to be appropriate for delegation and may require prior Board approval for specified procurement actions.

(5) Except as limited by the State Constitution, the Board may exercise any control authority conferred on a primary procurement unit by this Division II and, to the extent that its action conflicts with the action of the primary procurement unit, the action of the Board shall prevail.

(6) The Board, with the assistance of the department of Budget and Fiscal Planning, shall compile comprehensive statistics on the procurement system by agency, amount, and type of procurement.

(7) The Board shall develop and submit to the General Assembly, in accordance with § 2-1312 of the State Government Article, an annual report on the procurement system that includes information on actions necessary to improve effective broad-based competition in procurement.

Sec. 15-211. Jurisdiction; review

(a) The Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit:

(1) on a protest relating to the formation of a procurement contract; or

(2) except for a contract claim relating to a lease of real property, on a contract claim concerning:

(i) breach;

(ii) performance;

(iii) modification; or

(iv) termination.

(b) A decision of the Appeals Board is final, subject to any judicial review.

Sec. 15-215. Definitions

(a) In this Part III of this subtitle the following words have the meanings indicated.

(b)(1) "Contract claim" means a claim that relates to a procurement contract.

(2) "Contract claim" includes a claim about the performance, breach, modification, or termination of the procurement contract.

(c)(1) "Protest" means a complaint that relates to the formation of a procurement contract.

(2) "Protest" includes a complaint about:

(i) the qualifications of a bidder or offeror; or

(ii) the determination of the successful bidder or offeror.

Sec. 15-217. Initiation of protest or contract claim

(a) In general. –

(1) A prospective bidder or offeror, a bidder, or an offeror may submit a protest to the procurement officer.

(2) A person who has been awarded a procurement contract may submit a contract claim to the procurement officer.

(b) Time for submission. – A protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement.

Sec. 15-219. Same – Contract claims for construction contracts

(a) Explanation of claim. – Within 30 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor shall submit to the unit a written explanation that states:

(1) the amount of the contract claim;

(2) the facts on which the contract claim is based; and

(3) all relevant data and correspondence that may substantiate the contract claim.

(b) Review of claim. –

(1) Subject to paragraph (2) of this subsection, the head of the unit engaged in procurement of the construction shall review the contract claim.

(2) If the unit is part of a principal department or other equivalent unit, the Secretary of the principal department or the equivalent official shall review the contract claim, unless review has been delegated by regulation to the head of the unit.

(c) Notice of decision. – The person who reviews a contract claim under subsection (b) of this section shall:

(1) investigate the contract claim; and

(2) give the contractor written notice of a resolution of the contract claim within 180 days after receiving the contract claim or a longer period to which the parties agree.

(d) Decision not to pay claim. –

(1) A decision not to pay a contract claim is a final action for the purpose of appeal to the Appeals Board.

(2) The failure to reach a decision within the time required under subsection (c) of this section may be deemed, at the option of the contractor, to be a decision not to pay the contract claim.

(e) Release of retainage. – At the time of final payment, the unit shall:

(1) release the retainage due to the contractor; and

(2) pay any interest that:

(i) has accrued on the retainage from the time of payment of the semifinal estimate; and

(ii) is due and payable to the contractor.

Sec. 15-220. Appeals

(a) Except for a contract claim related to a lease for real property, a bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a unit to the Appeals Board.

(b) An appeal under this section shall be filed:

(1) for a protest, within 10 days after receipt of the notice of a final action; and

(2) for a contract claim, within 30 days after receipt of the notice of a final action.

CODE OF MARYLAND REGULATIONS ("COMAR") (1995)

COMAR 21.07.01.06 Disputes.

Mandatory provision for all contracts. One of the following clauses is preferred:

A. Alternate Disputes Clause (short form). "This contract shall be subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland, and COMAR 21.10 (Administrative and Civil Remedies). Pending resolution of a claim, the Contractor shall proceed diligently with the performance

of the contract in accordance with the procurement officer's decision."

B. Alternate Disputes Clause (long form).

"(1) This contract is subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2, Annotated Code of Maryland and COMAR 21.10 (Administrative and Civil Remedies).

(2) Except as otherwise may be provided by law, all disputes arising under or as a result of a breach of this contract that are not disposed of by mutual agreement shall be resolved in accordance with this clause.

(3) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause. However, if the submission subsequently is not acted upon in a reasonable time, or is disputed as to liability or amount, it may be converted to a claim for the purpose of this clause.

(4) A claim shall be made in writing and submitted to the procurement officer for decision in consultation with the Office of the Attorney General.

(5) When a claim cannot be resolved by mutual agreement, the contractor shall submit a written request for final decision to the procurement officer. The written request shall set forth all the facts surrounding the controversy.

(6) The contractor, at the discretion of the procurement officer, may be afforded an opportunity to be heard and to offer evidence in support of his claim.

(7) The procurement officer shall render a written decision on all claims within 180 days of receipt of the contractor's written claim, unless the procurement officer determines that a longer period is necessary to resolve the claim. If a decision is not issued within 180 days, the procurement officer shall notify the contractor of the time within which a decision shall be rendered and the reasons for such time extension. The decision shall be furnished to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The procurement officer's decision shall be deemed the final action of the State.

(8) The procurement officer's decision shall be final and conclusive unless the contractor mails or otherwise files a written appeal with the Maryland State Board of Contract Appeals within 30 days of receipt of the decision.

(9) Pending resolution of a claim, the contractor shall proceed diligently with the performance of the contract in accordance with the procurement officer's decision."

COMAR 21.07.01.13 Delays and Extensions of Time.

Mandatory provision for all contracts. It shall be in substantially the same form as follows:

"Delays and Extensions of Time"

"The Contractor agrees to prosecute the work continuously and diligently and no charges or claims for damages shall be made by it for any delays or hindrances from any cause whatsoever during the progress of any portion of the work specified in this Contract.

"Time extensions will be granted only for excusable delays that arise from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the State in either its sovereign or contractual capacity, acts of another Contractor in the performance of a contract with the State, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of either the Contractor or the subcontractors or suppliers."

COMAR 21.07.02.02 Changes.

Mandatory provision for all construction contracts:

"Changes

"(1) The procurement officer unilaterally may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(a) In the specifications (including drawings and designs);

(b) In the method or manner of performance of the work;

(c) In the State-furnished facilities, equipment, materials, services, or site; or

(d) Directing acceleration in the performance of the work.

"(2) Any other written order or an oral order, including a direction, instruction, interpretation or determination, from the procurement officer that causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the procurement officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

"(3) Except as herein provided, no order, statement, or conduct of the procurement officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

"(4) Subject to paragraph (6), if any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly; provided, however, that except for claims based on defective specifications, no claim for any change under (2) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required; and provided further, that in the case of defective specifications for which the State is responsible,

the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

"(5) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he shall, within 30 days after receipt of a written change order under (1) above or the furnishing of written notice under (2) above, submit to the procurement officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the State. The statement of claim hereunder may be included in the notice under (2) above.

"(6) Each contract modification or change order that affects contract price shall be subject to the prior written approval of the procurement officer and other appropriate authorities and to prior certification of the appropriate fiscal authority of fund availability and the effect of the modification or change order on the project budget or the total construction cost. If, according to the certification of the fiscal authority, the contract modification or change order will cause an increase in cost that will exceed budgeted and available funds, the modification or change order may not be made unless sufficient additional funds are made available or the scope of the project is adjusted to permit its completion within the project budget.

"(7) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

COMAR 21.07.02.07 Default, Delay and Time Extensions.

Mandatory provision for all construction contracts:

"Termination for Default – Damages for Delay – Time Extensions

"(1) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within this time, the State may, by written notice to the Contractor, terminate his right to proceed with the work or the part of the work as to which there has been delay. In this event the State may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work the materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the State resulting from his refusal or failure to complete the work within the specified time.

"(2) If fixed and agreed liquidated damages are provided in the contract and if the State so terminates the Contractor's right to proceed, the resulting damage shall consist of such liquidated damages until a reasonable time as may be required for final completion of the work together with any increased costs occasioned the State in completing the work.

"(3) If fixed and agreed liquidated damages are provided in the contract and if the State does not so terminate the Contractor's right to proceed, the resulting damage shall consist of these liquidated damages until the work is completed or accepted.

"(4) The Contractor's right to proceed may not be so terminated nor the contractor charged with resulting damages if:

(a) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the State in either its sovereign or contractual capacity, acts of another Contractor in the performance of a contract with the State, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(b) The Contractor, within 10 days from the beginning of any such delay (unless the procurement officer grants a further period of time before the date of final payment under the contract), notifies the procurement officer in writing of the causes of delay. The procurement officer shall ascertain the facts and the extent of the delay an extend the time for completing the work when, in his judgement, the findings of fact justify such an extension, and his findings of fact shall be final and

conclusive on the parties, subject only to appeal as provided in the "Disputes" clause of this contract.

"(5) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to the clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the State, the contract shall be equitably adjusted to compensate for the termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

"(6) The rights and remedies of the State provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

"(7) As used in paragraph (4)(a) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier."

COMAR 21.10.04.01 Definitions.

A. In this chapter, the following words have the meanings indicated.

B. Terms Defined.

(1) "Claim" means a complaint by a contractor or by a procurement agency relating to a contract subject to this title, except a real property lease.

(2) "Reviewing authority" means:

(a) With respect to the Department of Transportation, the Administrator, and the University of Maryland System, the Chancellor, or their respective designees;

(b) With respect to any other procurement agency, the agency head or designee.

COMAR 21.10.04.02 Filing of Claim by Contractor.

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. The claim shall be in writing and shall contain;

(1) An explanation of the claim, including reference to all contract provisions upon which it is based;

(2) The amount of the claim;

(3) The facts upon which the claim is based;

(4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and

(5) A certification by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 shall be dismissed.

D. Each procurement contract shall provide notice of the time requirements of this regulation.

COMAR 21.10.04.04 Disposition of Claim.

A. The procurement officer may conduct discussions or negotiations regarding the claim and, subject to approval by the reviewing authority and the Office of the Attorney General, and consistent with the budget and applicable law, may settle the claim. The settlement

agreement shall be written, shall provide for an appropriate release, and shall be supported by a written determination of the procurement officer that the settlement is in the best interests of the State.

B. If discussions or negotiations are not conducted or if the claim is not settled, the procurement officer shall prepare a recommended decision on the claim, which normally should contain:

(1) A description of the claim;

(2) A reference to pertinent contract provisions;

(3) A statement of factual areas of agreement or disagreement;

(4) A statement of the proposed decision, with supporting rationale; and

(5) A paragraph substantially as follows: "This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.04.06. If you decide to take such an appeal, you must mail or otherwise file a written notice of appeal with the Appeals Board within 30 days from the date you receive this decision."

C. The claim and recommended decision of the procurement officer shall be submitted for review to the reviewing authority and the Office of the Attorney General. The reviewing authority may approve, modify, or disapprove the recommended decision. In disapproving a recommended decision, the reviewing authority may order the procurement officer to effect a resolution of the claim.

D. Unless the claim is remanded to the procurement officer, the decision of the reviewing authority is the final action by the procurement agency and shall be furnished to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

E. Construction Contracts.

(1) The Contractor shall be notified in writing of the reviewing authority's decision within 180 days of receipt of the claim by the procurement officer or within such enlarged period as may be agreed upon by the contractor. The requirement for notification is satisfied upon mailing of the decision within the 180-day period or the enlarged period.

(2) Failure to reach a decision within the time prescribed in §E(1) shall be considered a decision to deny the claim that may be appealed in accordance with COMAR 21.10.04.06.

COMAR 21.10.04.06 Time for Filing Appeal.

A. An appeal to the Appeals Board shall be mailed or otherwise filed within 30 days of the receipt of notice of the final decision. The notice shall indicate that an appeal is intended, shall reference the decision from which the appeal is being taken, and shall identify the contract involved.

B. An appeal based upon a failure to reach a decision within the period prescribed in COMAR 21.10.04.04E shall be filed within 30 days of the expiration of the prescribed period.

C. A copy of the notice of appeal shall be furnished to the procurement officer.

D. An appeal received by the Appeals Board after the time prescribed in §A or §B may not be considered unless it was sent by registered or certified mail not later than the fifth day, or by mailgram not later than the third day, before the final date for filing an appeal as specified in §A or §B. A date affixed by postage meter will not be considered as evidence of the actual mailing date. The only acceptable evidence to establish the date of mailing shall be the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. The only acceptable evidence to establish the date of transmission by mailgram shall be the automatic date indication appearing on the mailgram. If the postmark or automatic date indication is illegible, the appeal shall be deemed to have been filed when received by the Appeals Board.

CODE OF MARYLAND REGULATIONS ("COMAR") (2001)

COMAR 21.10.04.02 Filing of Claim by Contractor.

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, or 30 days of this filing on a nonconstruction contract, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost quantification following the filing of the notice of claim is impossible or impractical. The claim shall be in writing and shall contain:

(1) An explanation of the claim, including reference to all contract provisions upon which it is based;

(2) The amount of the claim;

(3) The facts upon which the claim is based;

(4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and

(5) A certification by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

D. Each procurement contract shall provide notice of the time requirements of this regulation.

Maryland Department of Transportation

GENERAL PROVISIONS FOR CONSTRUCTION CONTRACTS (1989)

GP-4.06 Changes

A. The procurement officer may unilaterally, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

1. In the specifications (including drawings and designs);

2. In the method or manner of performance of the work;

3. In the State-furnished facilities, equipment, materials, services, or site; or

4. Directing acceleration in the performance of the work.

B. Any other written order or an oral order including a direction, instruction, interpretation or determination from the procurement officer that causes any such change, shall be treated as a change order under this

clause, provided that the Contractor gives the procurement officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

C. Except as herein provided, no order, statement, or conduct of the procurement officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

D. Subject to paragraph F., if any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. Provided, however, that except for claims based on defective specifications, no claim for any change under B. above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required; and provided further, that in the case of defective specifications for which the State is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

E. If the Contractor intends to assert a claim for an equitable adjustment under this clause, he shall, within 30 days after receipt of a written change order under A, above or the furnishing of written notice under B, above, submit to the procurement officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the State.

The statement of claim hereunder may be included in the notice under B. above.

F. Each contract modification or change order that affects contract price shall be subject to the prior written approval of the procurement officer and other appropriate authorities and to prior certification of the appropriate fiscal authority of fund availability and the effect of the modification or change order on the project budget for the total construction cost. If, according to the certification of the fiscal authority, the contract modification or change order will cause an increase in cost that will exceed budgeted and available funds, the modification or change order may not be made unless sufficient additional funds are made available or the scope of the project is adjusted to permit its completion within the project budget.

G. No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

GP-5.14 Claims

Unless a shorter period is prescribed by law or elsewhere in this Contract,

A. The Contractor shall file a written notice of claim for extension of time, equitable adjustment, extra compensation, damages, or any other matter (whether under or relating to this Contract) with the procurement officer

within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. The claim shall be in writing and shall contain:

1. An explanation of the claim, including reference to all contract provisions upon which it is based;

2. The amount of the claim;

3. The facts upon which the claim is based;

4. All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and

5. A certification by a senior official, officer, or general partner of the contractor or subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the administration is liable.

C. The claim shall also contain itemized supporting data for the elements of cost the contractor claims to have incurred or it will incur. This data shall be in sufficient detail to permit analysis by the Administration of material, labor, equipment, subcontract and overhead costs as well as profit and shall include all work covered by the claim, whether deleted, added, or changed. Subcontract cost shall be supported by similar detailed data.

D. A notice of claim or a claim that is not filed within the prescribed time shall be dismissed.

GP-5.15 Disputes

A. This contract is subject to the provisions of Title 15, Subtitle 2, State Finance and Procurement Article (Dispute Resolution) of the Annotated Code of Maryland and COMAR 21.10 (Administrative and Civil Remedies).

B. Except as otherwise may be provided by law, all disputes arising under or as a result of a breach of this contract that are not disposed of by mutual agreement shall be resolved in accordance with this clause.

C. As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause. However, if the submission subsequently is not acted upon in a reasonable time, or is disputed either as to liability or amount, it may be converted to a claim for the purpose of this clause.

D. A claim shall be made in writing and submitted to the procurement officer for decision in consultation with the Office of the Attorney General.

E. When a claim cannot be resolved by mutual agreement, the contractor shall submit a written request for final decision to the procurement officer. The written

request shall set forth all the facts surrounding the controversy.

F. The Contractor, at the discretion of the procurement officer, may be afforded an opportunity to be heard and to offer evidence in support of his claim.

G. The procurement officer shall render a written decision on all claims within 180 days of receipt of the Contractor's written claim, unless the time is extended by mutual agreement of the parties. If a decision is not issued within 180 days, the procurement officer shall notify the Contractor of the time within which a decision shall be rendered and the reasons for such time extension. The decision shall be furnished to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The procurement officer's decision shall be deemed the final action of the State.

H. The procurement officer's decision shall be final and conclusive unless the Contractor mails or otherwise files a written appeal with the Maryland State Board of Contract Appeals within 30 days of receipt of the decision.

I. Pending resolution of a claim, the Contractor shall proceed diligently with the performance of the contract in accordance with the procurement officer's decision.